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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-208

In re Applications of

UNITED EDUCATIONAL BROADCASTING, INC. File No. BRED-910401B8

For Renewal of License
of Noncommercial Educational
Station WBMR-FM
Telford, Pennsylvania

and

BUX-MONT EDUCATIONAL RADIO ASSOCIATION File No. BPED-910701MA

For a Construction Permit
for a New Noncommercial
Educational FM Station
Doylestown, Pennsylvania

HEARING DESIGNATION ORDER

Adopted: September 1, 1992; Released: September 21, 1992

By the Chief, Audio Services Division, Mass Media Bureau:

1. The Commission, by the Chief, Audio Services Division, Mass Media Bureau, has before it for consideration the following mutually exclusive applications: (a) the application of United Educational Broadcasting, Inc. (United) for renewal of license of Noncommercial Educational Station WBMR-FM, Telford, Pennsylvania, and (b) the application of Bux-Mont Educational Radio Association (Bux-Mont) for a construction permit for a new Noncommercial Educational FM station on Channel 219A at Doylestown, Pennsylvania.[1]

2. *Bux-Mont.* Our engineering review reveals a discrepancy between Bux-Mont's application and the Commission's files with respect to the height of Bux-Mont's proposed tower. Bux-Mont proposes to mount its antenna on an existing tower. According to Bux-Mont's application, the tower stands 97 meters above ground and 250 meters above mean sea level. The Commission's files state, however, that the tower is 100 meters above ground and 253 meters above mean sea level. This matter requires clarification. Therefore, Bux-Mont will be required to submit a clarifying amendment to the presiding Administrative Law Judge within 30 days of release of this Order.

3. Section II, Item 8, of FCC Form 340 (May 1989) requires that an applicant provide the name(s) and residence address(es) of the parties to the application. Bux-Mont has not completed this item correctly in that it fails to provide the number and street of the residence addresses of its Trustees. Accordingly, Bux-Mont must submit an amendment which provides all the information required by this item to the presiding Administrative Law Judge within 30 days of release of this Order.

4. Our engineering study indicates that Bux-Mont failed to address the matter of how it proposes to resolve any RF exposure to workers on its tower. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that Bux-Mont may have failed to comply with the environmental criteria set forth in the *Report and Order in Gen. Docket No. 79-163*, 51 Fed. Reg. 14999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. §1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. §1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. §1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Bux-Mont failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, it will be required to submit the environmental impact information described in 47 C.F.R. §1.1311. *See generally*, OST Bulletin No. 65 (October 1985) entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation" at 28. Therefore, Bux-Mont will be required to file, within 30 days of receipt of the *Hearing Designation Order*, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. §1.1308. Accordingly, the comparative phase of this case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.* 71 FCC 2d 2289 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the EA that Bux-Mont's proposal will not have a significant impact on the quality of the human environment, the contingent environmental issue specified below shall be deleted and the presiding judge shall thereafter not consider the environmental effects of Bux-Mont's proposal. *See* 47 C.F.R. §1.1308(d).

5. Bux-Mont requests a waiver of 47 C.F.R. §73.1125 (main studio rule) to operate its proposed station as a satellite of Station WRDV, Warminster, Pennsylvania. In

[1] Although the applications are apparently for two different communities, the interfering contour of each application overlaps the protected contour of the other. Since the Bux-Mont application was timely filed and grant of the United application would effectively preclude the grant of the Bux-Mont application, they are mutually exclusive and must be consolidated for hearing. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

support of its waiver request, Bux-Mont states that an STL will be installed to permit separate programming to Doylestown; that the ability to do live remote broadcasts already exists and will be used from time to time to feed the Doylestown transmitter; that leaders of the Doylestown community will be regularly interviewed to ascertain issues and needs which require attention; and that a toll-free number will be established. Additionally, since the applicant functions with a volunteer staff, some of whom come from the Doylestown area, it is anticipated that they will supplement the station's ascertainment of needs and issues. According to Bux-Mont, operating in this way will allow valuable resources to be devoted towards providing service unique to Doylestown with better results and quality of service, especially localized service. Bux-Mont posits that such centralized operation will insure the effective and efficient provision of programming that addresses Doylestown's educational, civic, cultural and community concerns.

6. The Commission has stated that it recognizes:

> the benefits of centralized operations for noncommercial educational stations, given the limited funding available to these stations., and we have granted waivers to state and regional public television and radio networks to operate 'satellite' stations that do not necessarily meet the requirements of a main studio. These stations, however, have not been permitted to ignore local service obligations, and waivers generally have been granted only upon a showing that the local community would be served.

See *Memorandum Opinion and Order re Amendment of Section 73.1125*, 3 FCC Rcd 5024 at 5026-27 (1988).

In the instant case, it appears that Bux-Mont's proposal is designed to insure that local needs of Doylestown will be met. Accordingly, Bux-Mont's waiver request will be granted.

7. *Other matters.* The applicants have not indicated whether an attempt has been made to negotiate a share-time arrangement. Therefore an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before or after the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time arrangement between themselves.

8. The respective proposals are for different communities. United and Bux-Mont do not serve substantial areas in common. Consequently, it will be necessary to determine, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

9. Except as indicated above, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding upon the issues specified below.

10. Accordingly, IT IS ORDERED, That pursuant to § 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. If a final environmental impact statement is issued with respect to Bux-Mont in which it is concluded that its proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§1.1301-1319.
>
> 2. To determine, (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and populations served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.
>
> 3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the application should be granted, if any.

11. IT IS FURTHER ORDERED, That, pursuant to paragraph 2 above, Bux-Mont shall submit an amendment clarifying its tower height with the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That, pursuant to paragraph 3 above, Bux-Mont shall submit an amendment which contains the information required by Section II, Item 8 of FCC Form 340 to the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That, pursuant to paragraph 4 above, within 30 days of the release of this Order, Bux-Mont shall submit the required environmental assessment required by § 1.1311 to the presiding Administrative Law Judge, with a copy to the Chief, Audio Services Division.

14. IT IS FURTHER ORDERED, That Bux-Mont's request for a waiver of 47 C.F.R. 73.1125 is GRANTED.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date

of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street N.W., Washington D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice, as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-196

In the Matter of

Amendment of Section 73.202(b), RM-8041
Table of Allotments,
FM Broadcast Stations.
(Tallassee and Tuskegee, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 10, 1992; Released: September 21, 1992

Comment Date: November 12, 1992
Reply Comment Date: November 27, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Tiger Broadcasting Company, Inc. ("petitioner"), permittee of Station WACQ-FM, Channel 260A, Tuskegee, Alabama, requesting the reallotment of its channel to Tallassee, Alabama, and modification of its permit accordingly. Petitioner stated its intention to promptly file an application for Channel 260A if reallotted to Tallassee, as requested.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules. In this regard, petitioner advises that the requested reallotment of Channel 260A to Tallassee is mutually exclusive with its current use at Tuskegee, since it does not intend to relocate from its present transmitter site. According to petitioner, Station WACQ-FM currently provides a 70 dBu signal over the entire community of Tallassee from its current site. Moreover, petitioner adds that Tuskegee (population 12,257)[1] has two FM stations whereas Tallassee (population 5,112) has none. Additionally, while Tuskegee is served locally by full-time Station WBIL(AM), petitioner advises that Tallassee is provided local service by Station WTLS(AM), which operates daytime only. Therefore, petitioner advises that its proposal would bring a first local FM transmission service, as well as a first fulltime aural transmission service, to Tallassee, and would not deprive Tuskegee of local transmission service.[2] In further support of its proposal, petitioner states that neither Tuskegee nor Tallassee are located within an urbanized area, and therefore the requested reallotment would not result in the shift of its station from a rural to an urban area.

3. A staff engineering analysis reveals that Channel 260A can be allotted to Tallassee in conformity with the minimum distance separation requirements of Section 73.202(b)(1) of the Commission's Rules.[3]

4. We believe the public interest would be served by proposing to reallocate Channel 260A from Tuskegee to Tallassee, Alabama, as requested. Therefore, we shall propose to modify Station WACQ-FM to specify Tallassee as its community of license on Channel 260A. In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 260A at Tallassee or require the petitioner to demonstrate the availability of an additional equivalent class channel at Tallassee.

5. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Tallassee, Alabama	--	260A
Tuskegee, Alabama	240A, 260A	240A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **November 12, 1992,** and reply comments on or before **November 27, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

M. Scott Johnson, Esq.
Catherine M. Withers, Esq.
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and

[1] Population figures were taken from the 1990 U.S. Census.
[2] Station WBIL-FM, Channel 240A, is licensed to Tuskegee.
[3] Coordinates used in this determination are those at the authorized site of Station WACQ-FM at 32-26-30 and 85-47-45.

such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-102

In the Matter of

Amendment of Section 73.202(b), RM-7969
Table of Allotments,
FM Broadcast Stations.
(Pequot Lakes, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 10, 1992; Released: September 21, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 3013 (1992), issued in response to a petition filed by Minnesota Christian Broadcasters, Inc. ("petitioner"), proposing the substitution of FM Channel 274C2 for Channel 261A at Pequot Lakes, Minnesota. Petitioner also requested modification of its license for Station KTIG, Channel 261A, to specify operation on Channel 274C2. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 274C2 for Channel 261A at Pequot Lakes, Minnesota, since it could provide the community with its first wide coverage FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[1] Since Pequot Lakes is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment. In addition, we have authorized a modification of petitioner's license for Station KTIG, Pequot Lakes, Minnesota, to specify operation on Channel 274C2 in accordance with Section 1.420(g) of the Commission's Rules, since no other expressions of interest have been received.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 5, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Pequot Lakes, Minnesota	274C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KTIG, Pequot Lakes, Minnesota, IS MODIFIED to specify operation on Channel 274C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Minnesota Public Radio
45 East 7th Street
St. Paul, Minnesota 55101

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Minnesota Christian Broadcasters, Inc., licensee of Station KTIG, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 274C2 are 46-36-06 and 94-18-55. Channel 274C2 is short-spaced to the allotment site for Channel 274C1, Thief River Falls, Minnesota, but is fully spaced to the construction permit filed by Minnesota Public Radio for Station KNTN (BMPH-900131TC). Minnesota Public Radio filed an application for a license to cover the construction permit on December 16, 1991 (BLH-911216KA).

[2] The *Notice* stated that Channel 237C2 was available for allotment at Pequot Lakes should other parties indicate an interest in applying for a C2 channel in the community.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-104

In the Matter of

Amendment of Section 73.202(b), RM-7972
Table of Allotments,
FM Broadcast Stations.
(Lake City, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 10, 1992; Released: September 21, 1992

By the Chief, Allocations Branch:

1. Pursuant to the request of New Horizons Broadcasting Company, Inc. ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 3009 (1992), proposing the allotment of Channel *285A to Lake City, Michigan, and reservation of the channel for noncommercial educational use. Supporting comments were filed by the petitioner reiterating its intention to apply for the channel.[1] No other comments were received.

2. As stated in the *Notice*, noncommercial educational stations generally operate within the reserved portion of the FM band (Channels 201-220). Exceptions have been made in cases where the channels in the noncommercial educational band are not available because of foreign allocations (Canadian or Mexican) or potential interference to operations on VHF Television Channel 6. Here, potential interference to Station WCML-TV, Channel 6, Alpena, Michigan, appears to justify the reservation of a channel in the nonreserved band (221-300) for noncommercial educational use. The allotment and reservation of a commercial channel appears to be the only way to provide a noncommercial channel to Lake City.

3. After a review of the comments, we conclude that the reservation of a commercial channel is justified. No party has expressed an interest in the use of the channel as a commercial facility. Channel 285A can be allotted to Lake City, Michigan, in compliance with the Commission's minimum distance separation requirements without a site restriction.[2] Since Lake City is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

4. We believe the public interest would be served by the Allotment of Channel *285A to Lake City, Michigan, since it would provide the community with its first noncommercial educational FM channel. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 5, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Lake City, Michigan	*285A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The *Notice* requested petitioner to verify the statements contained in its petition in compliance with Section 1.52 of the Commission's Rules. In response to that request, petitioner filed comments verifying the accuracy of the information contained in its petition.

[2] The coordinates for Channel *285A are 44-19-48 and 85-12-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Various Locations)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 10, 1992; Released: September 21, 1992

By the Chief, Allocations Branch:

1. This *Order* amends Section 73.202(b) of the Commission's Rules, the Table of FM Allotments, to specify the classes of channels allotted to various communities. These amendments are necessary to reflect changes that have been authorized in response to applications filed by licensees and permittees operating on these channels. This action is taken pursuant to *Revision of Section 73.3573(a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment*, 4 FCC Rcd 2413 (1989). The attached Appendix shows the Table, as amended for those communities.

2. This action constitutes an editorial change in the Table of FM Allotments. Therefore, a public notice and comment proceeding is unnecessary. *See* 5 U.S.C. 553(b)(A) and (B).

3. For further information concerning this proceeding, contact Michael C. Ruger, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

Community	Channel Deleted	Channel Added
Blytheville, Arkansas	242C2	242C1
Harrison, Arkansas	275C	275C1
Van Buren, Arkansas	274C2	274C3
Clifton, Arizona	271C	271C1
Colorado City, Arizona	296C1	296C3
Kingman, Arizona	260C1, 290C	260C2, 290C1
Payson, Arizona	266C	266C1
Pinetop, Arizona	294C	294C1
Window Rock, Arizona	241C	241C1
Eureka, California	222C	222C1
Susanville, California	242C2	242C3
Ouray, Colorado	289C2	289C3
Key West, Florida	254C, 258C	254C1, 258C1
Panama City, Florida	223C	223C1
Hilo, Hawaii	224C1	224C3
Kealakekua, Hawaii	268C	268C3
Webster City, Iowa	239C2	239C3
Rupert, Idaho	223C	223A
Colby, Kansas	250C	250C1
Goodland, Kansas	273C	273C1
Wichita, Kansas	279C	279C1
Central City, Kentucky	270C	270C1
Greenup, Kentucky	289B1	289C3
Galliano, Louisiana	232C2	232C3
Old Town, Maine	297B	297C2
Houghton, Michigan	242C	242C1
Petoskey, Michigan	255C	255C1
Laurel, Montana	269C	269C1
Fargo, North Dakota	300C	300C1
Carlsbad, New Mexico	281C	281C1
Grants, New Mexico	265C2	265A
Roswell, New Mexico	263C	263C1
Watertown, New York	248C	248C1
Broken Bow, Oklahoma	291C2	291C3
Lawton, Oklahoma	258C2	258A
Altamont, Oregon	267C	267C1
Medford, Oregon	278C	278C1
Redmond, Oregon	275C	275C1
Hanahan, South Carolina	241C	241C1
Memphis, Tennessee	283C	283C1
Abilene, Texas	286C	286C1
Amarillo, Texas	245C, 270C	245C1, 270C1
Clarksville, Texas	253C3	253A
Dalhart, Texas	240C3	240A
Llano, Texas	284C2	284C3
Refugio, Texas	291C2	291C3
Tyler, Texas	226C	226C1
Edmonds, Washington	287C	287C1
Walla Walla, Washington	264C2	264C3
New Richmond, Wisconsin	296C2	296C3
Buffalo, Wyoming	225C	225C1

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-416

In the Matter of

Amendment of Section 73.202(b),	RM-6700
Table of Allotments,	RM-6858
FM Broadcast Stations.	RM-7207
(Metropolis, Illinois,	RM-7208
Clinton and Wickliffe,	RM-7209
Kentucky, Camden,	
Dyer and Henderson,	
Tennessee[1])	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 11, 1992; Released: September 21, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause* ("*Notice*"), 4 FCC Rcd 7032 (1989), issued in response to two mutually exclusive petitions for rule making. Samuel K. Stratemeyer/Sun Media, Inc. ("Sun Media"),[2] licensee of Station WRIK(FM), Channel 252A, Metropolis, Illinois, requested the substitution of Channel 252C2 for Channel 252A at Metropolis, Illinois, and the modification of its license to specify operation on the higher class channel. In order to accommodate the upgrade at Metropolis, Sun Media also requested the substitution of Channel 240A for Channel 252A at Camden, Tennessee, and the modification of Station WRJB(FM)'s license accordingly; and the substitution of Channel 239A for Channel 240A at Henderson, Tennessee, and modification of the license for Station WFKX(FM) (RM-6700). Valley Wide Broadcasting, Inc. ("Valley"), requested the substitution of Channel 252C3 for Channel 252A at Camden, Tennessee, and the modification of its license for Station WRJB(FM) to specify operation on the higher powered channel (RM-6858).

2. In response to the *Notice*, Purchase Sound, Inc. ("Purchase"), licensee of Station WYMC(FM), Channel 240A, Wickliffe, Kentucky, filed a counterproposal requesting the substitution of Channel 240C3 for Channel 240A at Wickliffe, Kentucky, and the reallotment of Channel 240C3 from Wickliffe to Clinton, Kentucky, as that community's first local service (RM-7207). West Haven Broadcasting ("West Haven") requested the allotment of Channel 239A to Dyer, Tennessee (RM-7208). Valley requested the substitution of Channel 252C3 for Channel 252A at Camden, the substitution of Channel 239C3 for Channel 252A at Metropolis, and the substitution of Channel 271A for Channel 240A at Wickliffe (RM-7209).[3] Wolfe Communications, Inc. ("Wolfe"), licensee of Station WFKX(FM), Channel 240A, Henderson, Tennessee, filed comments. Sun Media, Valley, West Haven and Wolfe filed reply comments. In response to the counterproposals West Haven filed comments.[4]

3. West Haven filed comments and a counterproposal requesting the allotment of Channel 239A to Dyer, Tennessee, as that community's first local transmission service. West Haven states that Dyer is an incorporated community with a population of 2,491 persons, according to the 1980 Census. West Haven contends that its proposal should receive preference over the other proposals in this proceeding since it will provide first local transmission service to the community of Dyer. West Haven states that it will apply for Channel 239A at Dyer, if allotted.

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[1] The communities of Clinton and Wickliffe, Kentucky, and Dyer, Tennessee, have been added to the caption.

[2] Sun Media is the successor to Samuel K. Stratemeyer, who is the President and sole shareholder of Sun Media, Inc. Therefore, throughout this proceeding we will refer to Stratemeyer as "Sun Media".

[3] Public Notice of the counterproposals was given on December 20, 1989, Report No. 1804.

Purchase subsequently requested withdrawal of its counterproposal. Therefore, we will dismiss Purchase's counterproposal or any comments responsive thereto (RM-7207). In accordance with Section 1.420(j) of the Commission's Rules, Purchase submitted a statement that it has not received or been promised any consideration for withdrawal of its petition for rule making.

Valley's counterproposal (RM-7209) is unacceptable for consideration in this proceeding. Upon further analysis, we determined that Channel 239C3 cannot be allotted to Metropolis. The channel would be short-spaced to the vacant allotment for Channel 239A, Calvert City, Kentucky. Furthermore, the substitution of Channel 271A for Channel 240A at Wickliffe, Kentucky, would require the licensee for Station WYMC(FM) to change transmitter site. It is Commission policy not to require stations to change transmitter sites merely to accommodate new or improved FM service elsewhere. *See North Charleston, South Carolina*, 47 Fed. Reg. 10560, published March 11, 1982. The licensee of Station WYMC(FM) did not indicate its consent to the site change. Therefore, any and all responsive pleadings to this counterproposal are now moot and will not be discussed.

[4] Sun Media requested an extension of time to respond to the counterproposals, which West Haven opposed. We denied the request. *See* 5 FCC Rcd 492 (1990).

After the record closed Sun Media filed a motion for leave to respond to counterproposals or in the alternative, for reconsideration of the order denying its request for extension of time. Sun Media also filed a contingent request to "Dismiss Motion for Leave to file a Reply to Counterproposals." Valley filed a "Motion to Dismiss Sun Media's Reply to Counterproposals." Sun Media filed an "Opposition to Valley's Motion to Dismiss its Reply to Counterproposals." Section 1.415(d) of the Commission's Rules does not contemplate the filing of pleadings beyond the comment and reply comment period. Furthermore, as stated in Section 1.420(d), counterproposals will only be accepted if filed in initial comments. Sun Media's late reply comments propose a channel substitution at Bolivar, Tennessee as a means of accommodating several proposals in this proceeding. As this constitutes an untimely filed counterproposal, we shall not consider it herein.

4. Sun Media in its comments argues that upgrading Station WRIK to full Class C2 status would be more spectrally efficient than upgrading Station WRJB to Class C3 status. Sun Media states that Station WRIK(FM) would serve a population of 186,890, according to 1986 updated census data, for an increase in service population of 103,356 people. Sun Media states that in terms of area a Class C2 facility would serve 8,496.7 square kilometers, an increase of 6,656.2 square kilometers over the present area. A Class C3 facility at Station WRJB, however, would serve only 74,610 persons, a gain population of 48,302 persons and a gain area of only 2,827.8 square kilometers. Sun Media restates its intention to reimburse the Camden and Henderson licensees for the reasonable costs of changing frequencies to accommodate the WRIK upgrade pursuant to *Circleville, Ohio*, 8 FCC 2d 159 (1959). Sun Media states its intention to promptly apply for Channel 252C2 at Metropolis, if allotted.

5. Wolfe filed comments and reply comments supporting the substitution of Channel 252C3 for Channel 252A at Camden, Tennessee, and opposing the substitution of Channel 252C2 for Channel 252A at Metropolis, Illinois. Wolfe states that if Sun Media's proposal to allot Channel 252C2 to Metropolis is adopted, Station WFKX(FM) will be unable to increase its power to 6 kW on Channel 239A as proposed, and Station WRJB(FM), Camden, would not be able to increase Station WRJB(FM)'s power to 6 kW on Channel 240A. However, if Channel 252C3 is allotted to Camden, Wolfe's station would be able to increase its power to 6 kW. Wolfe states that while the *Notice* recognizes that a gain study is required to choose between Metropolis and Camden, the *Notice* does not consider the preclusionary effect that the Metropolis upgrade would have on Station WFKX(FM)'s ability to achieve a full Class A operation at 6 kW. Wolfe believes that Sun Media's proposal raises a "substantial question of material fact" concerning the future use of the electromagnetic spectrum, thereby warranting a hearing on whether Station WFKX(FM)'s license should be modified. Wolfe also states that traditional reimbursement is not adequate compensation in this case, because of the economic loss Station WRJB will incur. Finally, Wolfe contends that the public interest would not be served by accommodating the private interests of Sun Media to the detriment of the existing stations in Camden and Henderson, Tennessee.

6. Valley in reply comments states that if both its proposal and the West Haven counterproposal for Dyer, Tennessee, were granted, new reception service would become available to approximately 117,000 people in an area of 4,726 square kilometers, and Dyer would obtain its first local transmission service. In comparison, grant of Sun Media's proposal to upgrade Station WRIK(FM) would result in a net reception service increase of only 87,795 persons. Valley also argues that grant of Sun Media's proposal would preclude Stations WRJB and WFKX from operating at 6 kW. As a result, Stations WRJB and WFKX would suffer a combined loss of 16,643 persons in an area of 1,306 square kilometers.

7. West Haven in its reply comments states that its proposal to provide first local service to Dyer, Tennessee, should take precedence over service upgrades, citing *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). West Haven states its intention to apply for Channel 239A, if allotted to Dyer.

8. Sun Media in reply comments contends that its proposal must prevail, as a more efficient use of the spectrum would flow from its upgrade request over that of Valley's, citing *Endicott, New York*, 51 FCC 2d 50, 51 (1975).

DISCUSSION

9. As an initial matter, we realize that Camden's Station WRJB (FM) will be unable to increase power to 6 kW at its current site if Station WRIK(FM) is allowed to upgrade on Channel 252C2. However, according to our engineering analysis, Station WFKX(FM) at Henderson, at its current site, would be fully spaced to all other stations if it operated on Channel 239A. We find that Channel 240A at Camden constitutes an equivalent channel for allotment purposes. The *Second Report and Order* in MM Docket 88-375, which adopted the rule changes permitting 6 kW operation, stated that rule making proposals filed prior to October 2, 1989, would be processed in accordance with the rules then in effect. Petitioner's proposal, filed March 6, 1989, is entitled to processing under the pre-October 2, 1989, rules. *See Belvidere, New Jersey, Scranton and Tannersville, Pennsylvania*, 6 FCC Rcd 1333 (1991) and *Rocky Mount, North Carolina*, 6 FCC Rcd 2153 (1991).

10. A staff engineering analysis has determined that Channel 232A can be allotted to Dyer, Tennessee, with a site restriction 8.5 kilometers (5.3 miles) northwest, as that community's first local FM service.[5] Having located a nonconflicting channel for Dyer, the staff performed a search to determine if channels were available to accommodate the upgrade proposals at Metropolis, Illinois, and Camden, Tennessee. We were unable to locate an additional channel to resolve the conflict between Metropolis and Camden. Therefore, we will choose between the conflicting proposals and base our decision on the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) which are:

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service;

(4) Other public interest matters.

(Priorities 2 and 3 are co-equal).

In examining the conflicting proposals, we find that the first three priorities do not apply in this case since neither proposal would provide a first or second fulltime aural service. Therefore, we believe it appropriate to base our determination on which proposal should prevail under priority four, other public interest matters. This priority calls for the Commission to compare the benefits offered by conflicting proposals where the first three priorities do not apply or do not clearly favor any one proposal. In comparing conflicting requests for upgrades, the Commission looks at the additional area and population which each higher class allotment will provide. *See Greenup, Kentucky*, 2 FCC Rcd 4319 (1987), *aff'd in relevant part*, 4

[5] The coordinates for Channel 232A at Dyer are North Latitude 36-05-53 and West Longitude 89-04-41.

FCC Rcd 3843 (1989), *aff'd in relevant part*, 6 FCC Rcd 1493 (1991), *appeal dismissed sub. nom. WATH, Inc. v. FCC*, D.C. Cir. No. 91-1268 (September 26, 1991).

11. We have carefully reviewed the data submitted to determine which of the two proposals would provide new service to the greatest number of people. A staff analysis has confirmed that the use of Channel 252C2 at Metropolis, Illinois, would provide service to an additional 117,271 people, and Channel 252C3 at Camden, Tennessee, would provide service to an additional 48,787 people. Based on the larger population which would receive service (117,271 vs. 48,787) we find that the public interest would be better served by allotting Channel 252C2 to Metropolis, Illinois. Therefore, Valley's proposal to substitute Channel 252C3 for Channel 252A at Camden, Tennessee, shall be denied.

12. We believe the public interest would be better served by the substitution of Channel 252C2 for Channel 252A at Metropolis, Illinois, in order to provide that community with a wide area FM service. In accordance with Section 1.420(g) of the Commission's Rules, we will allot Channel 252C2 to Metropolis, Illinois, and modify the license of Station WRIK(FM) accordingly. In order to accommodate the Metropolis modification, we will substitute Channel 240A for Channel 252A at Camden, Tennessee, and modify the license for Station WRJB(FM) to specify Channel 240A, and substitute Channel 239A for Channel 240A at Henderson, Tennessee, and modify the license for Station WFKX(FM) to specify Channel 239A. Channel 252C2 can be allotted to Metropolis in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.6 kilometers (10.3 miles) southeast.[6] Channel 240A can be allotted to Camden in compliance with the Commission's minimum distance separation requirements and can be used at Station WRJB(FM)'s present transmitter site.[7] Channel 239A can be allotted to Henderson in compliance with the Commission's minimum distance separation requirements and can be used at Station WFKX(FM)'s present transmitter site.[8] We will also allot Channel 232A to Dyer, Tennessee, as that community's first local FM service.

13. Commission policy requires reimbursement to affected stations for the reasonable costs associated with changing frequencies. *See Circleville and Columbus, Ohio*, 8 FCC 2d 159 (1967). Sun Media has stated its intention to reimburse the licensees of Station WRJB(FM) and Station WFKX(FM) for the reasonable and prudent costs of changing frequencies to accommodate the upgrade at Metropolis, Illinois.

14. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 5, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Metropolis, Illinois	252C2
Camden, Tennessee	240A
Dyer, Tennessee	232A
Henderson, Tennessee	239A

15. The window period for filing applications on Channel 232A at Dyer, Tennessee, will open on **November 6, 1992,** and close on **December 7, 1992.**

16. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Sun Media, Inc., Station WRIK(FM), Metropolis, Illinois, IS MODIFIED, to specify operation on Channel 252C2 in lieu of Channel 252A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

17. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Valley Wide Broadcasting, Inc., Station WRJB(FM), Camden, Tennessee, IS MODIFIED, to specify operation on Channel 240A in lieu of Channel 252A, subject to the following conditions:

(a) Nothing contained herein shall be construed to authorize any change in license BLH-7102 except for the channel specified above. Any other changes, except for those specified under Section 73.1690 of the Rules, requires prior authorization for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED that the transmission facilities comply in all respects with license BLH-7102 except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of the commencement of program tests.

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[6] The coordinates for Metropolis are North Latitude 37-02-30 and West Longitude 88-36-00. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the licensee of Station WRIK(FM) may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station KTJJ(FM), Channel 253C, Farmington, Missouri.

[7] The coordinates for Channel 240A at Camden are North Latitude 36-03-25 and West Longitude 88-06-10. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the licensee of Station WRJB(FM) may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station WDXE(FM), Channel 240A, Lawrenceburg, Tennessee.

[8] The coordinates for Channel 239A at Henderson are North Latitude 35-29-52 and West Longitude 88-42-29.

18. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Wolfe Communications, Inc., Station WFKX(FM), Henderson, Tennessee, IS MODIFIED, to specify operation on Channel 239A in lieu of Channel 240A, subject to the following conditions:

(a) Nothing contained herein shall be construed to authorize any change in license BLH-840208AL except for the channel specified above. Any other changes, except for those specified under Section 73.1690 of the Rules, requires prior authorization for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED th the transmission facilities comply in all respects with license BLH-840208AL except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of the commencement of program tests.

19. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Report and Order* to Valley Wide Broadcasting, Inc., Radio Station WRJB(FM), P.O. Box 508, Camden, Tennessee 38320; Jerrold Miller, Miller & Fields, P.C., P.O. Box 33003, Washington, D.C. 20033 (Attorney for Valley Wide Broadcasting, Inc.) and Wolfe Communications, Inc., Radio Station WFKX(FM), P.O. Box 2763, Jackson, Tennessee 38302.

20. IT IS FURTHER ORDERED, That the Petition for Rule Making and the counterproposal filed on behalf of Valley Wide Broadcasting, Inc. ARE DENIED (RM-6858 & 7209).

21. IT IS FURTHER ORDERED, That the counterproposal filed by Purchase Sound, Inc. IS DISMISSED (RM-7207).

22. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

23. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-198

In the Matter of

Amendment of Section 73.202(b), RM-8056
Table of Allotments,
FM Broadcast Stations.
(Larose, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 11, 1992; Released: September 21, 1992

Comment Date: November 12, 1992
Reply Comment Date: November 27, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Electronics Unlimited, Inc. ("petitioner"), permittee of Station KMZM-FM, Channel 262A, Larose, Louisiana, requesting the substitution of Channel 262C1 for Channel 262A at Larose and modification of its construction permit for Station KMZM-FM to specify operation on the higher powered channel.

2. We believe the public interest would be served by proposing the substitution of Channel 262C1 for Channel 262A at Larose, Louisiana, since it could provide the community with a wide coverage area FM service. Channel 262C1 can be allotted to Larose in compliance with the Commission's minimum distance separation requirements with a site restriction of 23.6 kilometers (14.7 miles) south to accommodate petitioner's desired site.[1] As requested, we also propose to modify petitioner's authorization for Station KMZM-FM to specify operation on Channel 262C1. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Larose or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Larose, Louisiana	262A	262C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 12, 1992,** and reply comments on or before **November 27, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Timothy K. Brady, Esq.
P.O. Box 986
Brentwood, Tennessee 37027-0986
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 262C1 at Larose are North Latitude 29-22-00 and West Longitude 90-26-50.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 81-893

In the Matter of
Procedures for Implementing the
Detariffing of Customer Premises
Equipment and Enhanced Services
(Second Computer Inquiry)

NOTICE OF PROPOSED RULEMAKING

Adopted: August 25, 1992; Released: September 16, 1992

Comment Date: October 16, 1992
Reply Comment Date: November 6, 1992

By the Commission:

1. In the *Sixth Report and Order* in the *CPE Detariffing* proceeding,[1] the Commission established a framework under which certain federal agencies obtain equipment and services needed for national security and emergency preparedness (NSEP) communications. In that Order the Commission required American Telephone and Telegraph Co. (AT&T) and the Bell Operating Companies (BOCs) to report to the Chief, Common Carrier Bureau whenever they provided customer premises equipment (CPE) pursuant to the NSEP framework. In this Order we propose to eliminate the reporting requirements established in the *Sixth Report and Order* because they are no longer necessary.

2. In the *Second Computer Inquiry*,[2] the Commission established a set of rules which required AT&T and BOCs to provide CPE through a separate subsidiary. However, in order to enable AT&T and the BOCs to provide a single point of contact for the twenty-one designated NSEP systems and ensure that they are adequately maintained and managed for end-to-end communications services, the Commission subsequently granted AT&T and the BOCs a narrow waiver of the separate subsidiary requirement for CPE to enable them to maintain end-to-end responsibility for NSEP communications in certain emergencies and on a continuous basis for certain designated systems.[3] Under this waiver the BOCs are permitted to be responsible for the acquisition of limited amounts of new CPE to replace embedded CPE in the designated systems and for the reasonable augmentation of these systems. AT&T and the BOCs are also permitted to be responsible for the acquisition of unlimited amounts of CPE to support Presidentially-declared and other emergencies.

3. Because of possible impacts on competition for CPE sales for NSEP systems, and to ensure that AT&T and the BOCs were not abusing the waiver, the Commission required that AT&T and the BOCs submit two types of report to the Commission. First, AT&T and the BOCs are required to report quarterly on the types and quantities of new CPE provided pursuant to this waiver. Second, AT&T and the BOCs must report to the Chief, Common Carrier Bureau when the waiver is used and an unaffiliated alternative supplier cannot be named.[4]

4. We tentatively conclude that it is no longer necessary for AT&T and the BOCs to submit these reports. Since the release of the *Sixth Report and Order*, the Commission has removed the structural separation requirements for AT&T and the BOCs for the provision of CPE.[5] The CPE market has been very competitive for a number of years and there are many suppliers available to provide CPE.[6] During the period that AT&T and the BOCs have been reporting, we have not received any complaints alleging abuse of the waiver, nor have the reports they filed indicated any problems. We tentatively conclude that removing the NSEP reporting requirements is in the public interest because it removes an unnecessary reporting burden on AT&T and the BOCs.

5. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because the proposed rule amendments if promulgated, would not have a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. The Secretary shall send a copy of this Supplemental Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

6. This is a nonrestricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules.

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[1] Procedures for Detariffing of Customer Premises Equipment and Enhanced Services, Report and Order, CC Docket No. 81-893, 99 FCC 2d 1066 (1985) (*Sixth Report and Order*).

[2] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384 (1980) (*Computer II Final Order*), *modified on recon.*, 84 FCC 2d 50 (1980), (*Computer II Reconsideration Order*), *modified on further recon.*, 88 FCC 2d 512 (1981), (*Computer II Further Reconsideration Order*), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further reconsideration*, FCC 84-190 (released May 4, 1984).

[3] *Sixth Report and Order*, 99 FCC 2d at 1077, para. 26.

[4] *Id.* at 1080, para. 32; 1082, para. 37.

[5] *See* Furnishing of Customer Premises Equipment by Bell Operating Telephone Companies and the Independent Telephone Companies, Report and Order, 2 FCC Rcd 143 (1987) (*BOC CPE Relief Order*) (removing structural separation requirements from BOCs' provision of customer premises equipment), *modified on reconsideration*, 3 FCC Rcd 22 (1987) (modifying and clarifying several aspects of nonstructural safeguards); Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Co., Order, 102 FCC 2d 655 (1985) (*AT&T Structural Relief Order*), *modified in part on recon.*, FCC 86-341, 104 FCC 2d 739 (1986) (*AT&T Structural Relief Reconsideration Order*).

[6] *BOC CPE Relief Order*, 2 FCC Rcd at 144, para. 10.

See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206 (a). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§1.415 and 1.419, interested parties may file comments on or before October 16, 1992, and reply comments on or before November 6, 1992. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting documents. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington DC 20554. In addition, parties should file two copies of any such pleadings with the Policy and Planning Division, Common Carrier Bureau, Room 544, 1919 M St., N.W., Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with this Commission's copy contractor, The Downtown Copy Center, 1114 21st St., N.W., Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

7. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4, 201-205, 218, 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 218, 220, and 403, a NOTICE OF PROPOSED RULEMAKING IS HEREBY PROVIDED as explained herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-112

In the Matter of

Amendment of Section 73.202(b), RM-7982
Table of Allotments,
FM Broadcast Stations.
(Hawkinsville, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 21, 1992; Released: September 22, 1992

By the Chief, Allocations Branch:

1. Before the Commission is the *Notice of Proposed Rule Making*, 7 FCC Rcd 3109 (1992), issued in response to a petition for rule making filed by Tri-County Broadcasting Co. ("petitioner"), proposing the substitution of Channel 280C3 for Channel 280A at Hawkinsville and modification of its license for Station WCEH(FM) to specify operation on the higher powered channel. Petitioner filed comments reaffirming its interest. No other comments were filed.

2. We believe the public interest would be served by the substitution of Channel 280C3 for Channel 280A at Hawkinsville, since it could provide the community with a wide coverage area FM service. Channel 280C3 can be allotted to Hawkinsville in compliance with the Commission's minimum distance separation requirements with a site restriction 20.9 kilometers (13 miles) southwest to accommodate petitioner's desired site.[1] Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license for Station WCEH(FM) to specify operation on Channel 280C3. Channel 280C3 at Hawkinsville is currently short-spaced to Station WEGC(FM), Channel 279A, Leesburg, Georgia, and Station WXRS(FM), Channel 280A, Swainsboro, Georgia. However, Station WEGC(FM) was ordered to Channel 278C3 in MM Docket No. 91-336 and Station WXRS(FM) was ordered to Channel 263A in MM Docket No. 89-418. *See* 7 FCC Rcd 1972 (1992) and 6 FCC Rcd 5793 (1991), respectively. Therefore, final authorization of Station WCEH(FM) at Hawkinsville may be delayed until Station WEGC(FM) is licensed on Channel 278C3 and Station WXRS(FM) is licensed on Channel 263A.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 6, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Hawkinsville, Georgia	280C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Tri-County Broadcasting Co., for Station WCEH(FM), Hawkinsville, Georgia, IS MODIFIED, to specify operation on Channel 280C3 in lieu of Channel 280A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Report and Order* by Certified Mail, Receipt Requested to:

LaCom Communications, Inc.
P.O. Box 1590
Swainsboro, Georgia 30401
(Licensee of Station WXRS(FM))

Rowland Albany Radio, Inc.
235 Roosevelt Avenue, #501
Albany, Georgia 31701
(Licensee of Station WEGC(FM))

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, TriCounty Broadcasting Co., licensee of Station WCEH(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

[1] The coordinates for Channel 280C3 at Hawkinsville are North Latitude 32-10-32 and West Longitude 83-39-11.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-215

In the Matter of

Amendment of Section 73.202(b), RM-8063
Table of Allotments,
FM Broadcast Stations.
(Preston, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 24, 1992; Released: September 22, 1992

Comment Date: November 13, 1992
Reply Comment Date: November 30, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by KFIL Inc. ("petitioner") requesting the substitution of Channel 276C3 for Channel 276A at Preston, Minnesota.[1] Petitioner also requests modification of its license for Station KFIL-FM, Channel 276A, to specify operation on Channel 276C3. Petitioner submitted an engineering analysis in support of the proposal and states its intention to file an application for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 276C3 for Channel 276A at Preston, Minnesota, since it would provide the community with expanded service. Channel 276C3 can be allotted to Preston, Minnesota, at petitioner's specified site in compliance with the Commission's spacing requirements.[2] Channel 276C3 at Preston is short spaced to the allotment for Channel 278C2 at Waukon, Iowa, which has been reserved for Station KNEI-FM. Station KNEI-FM has a construction permit for Channel 278C2 at a site that is fully spaced to Channel 276C3 at Preston. The grant of a license for Channel 276C3 at Preston may be withheld pending issuance of a license for Station KNEI-FM, Waukon, on Channel 278C2. We shall also propose to modify the license for Station KFIL-FM, Channel 276A, to specify operation on Channel 276C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In view of the above, we believe it would serve the public interest to seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below:

	Channel No.	
City	Present	Proposed
Preston, Minnesota	276A	276C3

4. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

David H. Hogendorn
Station KNEI-FM
P.O. Box 151
Waukon, Iowa 52172

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 13, 1992,** and reply comments on or before **November 30, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Michael Borgen, President
KFIL Inc.
Box 377
Preston, Minnesota 55965

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed

[1] Although petitioner's request indicates that the original copy of its proposal was signed, it failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding substription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3910, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[2] The coordinates for Channel 276C3 at Preston are 43-44-38 and 91-54-04.

Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-214

In the Matter of

Amendment of Section 73.202(b), RM-8062
Table of Allotments,
FM Broadcast Stations.
(Columbia and Bourbon,
Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 24, 1992; Released. September 22, 1992

Comment Date: November 13, 1992
Reply Comment Date: November 30, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Al Greenfield d/b/a, The Greenfield Group ("petitioner"), seeking the substitution of Channel 244C1 for Channel 244C3 at Columbia, Missouri, and modification of its construction permit for Station KCMQ(FM) to specify operation on Channel 244C1. Petitioner requests the substitution of Channel 297A for vacant Channel 244A at Bourbon, Missouri, to accommodate the Columbia upgrade. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel.

2. We believe the public interest would be served by consideration of petitioner's proposal, as it could provide additional reception service to Columbia. A Commission engineering analysis indicates that Channel 244C1 can be allotted to Columbia, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules, provided vacant Channel 244A is deleted from Bourbon, Missouri.[1] Channel 297A can be allotted to Bourbon with a site restriction 2.6 kilometers (1.6 miles) southwest of the community.[2] The site restriction will prevent a short spacing to Station KMJM, Channel 299C, St. Louis, Missouri. We shall propose to modify the construction permit for Station KCMQ(FM), Channel 244C3, to specify operation on Channel 244C1 in accordance with Section 1.420(g) of the Commission's Rules.

3. We shall also seek comments as to whether we should delete Channel 244A at Bourbon. Channel 244A was allotted to Bourbon in MM Docket 89-74. *See* 6 FCC Rcd 250 (1991). The window for filing applications opened on March 1, 1991, and closed on April 1, 1991. There are no applications on file for the channel at Bourbon. If no applications are filed for Channel 244A during the comment cycle in this proceeding and no interest is expressed for Channel 297A, we shall delete the channel at Bourbon for lack of interest.

4. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following communities:

OPTION I

City	Channel No. Present	Proposed
Bourbon, Missouri	244A	297A
Columbia, Missouri	244C3, 252C2, 268C1, 272A	244C1, 252C2 268C1, 272A

OPTION II

Bourbon, Missouri	244A	---
Columbia, Missouri	244C3, 252C2, 268C1, 272A	244C1, 252C2, 266C1, 272A[3]

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 13, 1992,** and reply comments on or before **November 30, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Frank R. Jazzo
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036-2847

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's

[1] The coordinates for Channel 244C1 at Columbia are 38-37-40 and 92-07-00.
[2] The coordinates for Channel 297A at Bourbon are 38-08-30 and 91-16-00.
[3] Channel 272A was substituted for Channel 230A at Columbia, Missouri, in MM Docket 91-135, released May 11, 1992. NCD Broadcasting Company, Inc. has filed a Petition for Reconsideration of this action. *See* Public Notice of July 21, 1991, Report No. 1900.

Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-213

In the Matter of

Amendment of Section 73.202(b), RM-8060
Table of Allotments,
FM Broadcast Stations.
(Canton and Louisiana,
Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 24, 1992; Released: September 22, 1992

Comment Date: November 13, 1992
Reply Comment Date: November 30, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Foxfire Communications, Inc. ("petitioner"), proposing the substitution of Channel 271C3 for Channel 271A at Louisiana, Missouri. Petitioner also requests modification of its license for Station KJFM(FM), Channel 271A, to specify operation on Channel 271C3. Petitioner provided an engineering study in support of the proposal and indicated it would apply for the channel.

2. We believe petitioner's proposal warrants consideration because the proposed substitution would provide Louisiana with a wide coverage area FM service. Petitioner notes that Channel 271C3 can be allotted to Louisiana in compliance with the Commission's Rules provided Channel 265C3 is substituted for Channel 272C3 at Canton, Missouri.[1] Station KBXB, Canton, holds the construction permit for Channel 272C3. Since Bick Broadcasting, the permittee for Channel 272C3, Canton, consented to the substitution of channels, there is no need to issue an order to show cause.[2] Channel 265C3 can be allotted to Canton, Missouri, in compliance with Section 73.207(b) of the Commission's Rules at the existing site for Station KBXB.[3] Channel 265C3, Canton, is short-spaced to Station KPCR-FM, 265A, Bowling Green, Missouri, and Station WAHI, Channel 266A, Augusta, Illinois. However, Station KPCR-FM, Bowling Green, has been ordered to Channel 231C3 and Station WAHI, Augusta, has been modified to Channel 253A.[4] Therefore, grant of a license for Station KBXB, Canton, may be withheld until Station KPCR-FM is licensed on Channel 231C3 and Station WAHI is licensed on Channel 253A.

3. We shall propose to modify the license for Station KJFM(FM), Louisiana, Missouri, to specify operation on Channel 271C3, as requested. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept other expressions of interest for the channel at Louisiana.

4. In view of the above, we believe the public interest would be served by proposing the allotment of Channel 271C3 to Louisiana, Missouri, since it would provide the community with its first wide coverage area FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below:

	Channel No.	
City	Present	Proposed
Canton, Missouri	272C3	265C3
Louisiana, Missouri	271A	272C3

5. IT IS FURTHER ORDERED, That the Secretary of the Commission Shall Send by Certified Mail, Return Receipt Requested, a copy of this Notice of Proposed Rule Making to the following:

Pike County Broadcasting
Station KPCR-FM
P.O. Box 1
Bowling Green, Missouri 63334

Good News Broadcasters, Inc.
Station WAHI
Rt. 1, Box 72
Plymouth, Illinois 62367

Bick Broadcasting Company
Station KBXB
119 North Third Street
P.O. Box 711
Hannibal, Missouri 63401

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **November 13, 1992,** and reply comments on or before **November 30, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Thom T. Sanders, President
Foxfire Communications, Inc.
P.O. Box 438
Louisiana, Missouri 63353

[1] The coordinates for Channel 272C3 at Louisiana are 39-21-57 and 91-16-30.

[2] Petitioner provided a letter from James E. Janes, President, Bick Broadcasting, consenting to the substitution of Channel 265C3 for Channel 272C3.

[3] The coordinates for Channel 265C3 at Canton are 40-07-33 and 91-31-42.

[4] Station KPCR-FM, Bowling Green, was modified to specify operation on Channel 231C3 in MM Docket No. 90-131 (5 FCC Rcd 6543 (1990)) and Station WAHI, Augusta, Illinois, was modified to specify operation on Channel 253A in MM Docket No. 90-510 (7 FCC Rcd 2099 (1992)).

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-212

In the Matter of

Amendment of Section 73.202(b), RM-8064
Table of Allotments,
FM Broadcast Stations.
(Rudolph, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 24, 1992; Released: September 22, 1992

Comment Date: November 13, 1992
Reply Comment Date: November 30, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Wizard Communications, Inc. ("petitioner"), requesting the substitution of Channel 260C3 for Channel 260A at Rudolph, Wisconsin. Petitioner also requests modification of its license for Station WIZD, Channel 260A, to specify operation on Channel 260C3.[1]

2. We believe petitioner's proposal warrants consideration. Channel 260C3 can be allotted to Rudolph, Wisconsin, consistent with the Commission's spacing requirements at petitioner's specified site.[2] We shall also propose to modify the license for Station WIZD, Channel 260A, to specify operation on Channel 260C3, in accordance with Section 1.420(g) of the Commission's Rules.

3. In view of the above, we believe the public interest would be served by proposing the substitution of Channel 260C3 for Channel 260A at Rudolph, Wisconsin, since it could provide the community with a wide coverage area station. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Rudolph, Wisconsin	260A	260C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 13, 1992,** and reply comments on or before **November 30, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Jerold Miller
Miller & Miller, P.C.
P.O. Box 33003
Washington, D. C. 20033

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Petitioner was granted a construction permit for Channel 260A as a six kilowatt facility on April 6, 1992, which expires on October 6, 1993 (BPH-911218ID).

[2] The coordinates for Channel 260C3 are 44-21-31 and 89-39-23.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-211

In the Matter of

Amendment of Section 73.202(b), RM-8061
Table of Allotments,
FM Broadcast Stations.
(Lumberton, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 24, 1992; Released: September 22, 1992

Comment Date: November 13, 1992
Reply Comment Date: November 30, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Stone-Lamar Broadcast Services Corporation ("petitioner") requesting the substitution of Channel 237C1 for Channel 237C2 at Lumberton, Mississippi. Petitioner also requests modification of its license for Station WLUN, Channel 237C2, to specify operation on Channel 237C1.[1] Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration. Channel 237C1 can be allotted to Lumberton, Mississippi, consistent with the Commission's spacing requirements at petitioner's specified site.[2] Channel 237C1 is short spaced to Channel 237A, Station WJBD-FM, Thom[illegible]ille, Alabama. However, the license for Station WJBD-FM, 237A, was modified in MM Docket 90-563 to specify operation on Channel 237C2.[3] Channel 237C1 is also short spaced to the allotment site for Channel 235C, Mobile, Alabama. However, Station WKSJ-FM, Mobile, has a construction permit for Channel 235C that is fully spaced to Channel 237C1 at Lumberton (BMPH-900427ID). Therefore, the grant of a license for Channel 237C1 at Lumberton may be withheld until Station WJBM-FM and Station WKSJ-FM are licensed on their new channels. We shall also propose to modify the license for Station WLUN, Channel 237C2, to specify operation on Channel 237C1 in accordance with Section 1.420(g) of the Commission's Rules.

3. In view of the above, we believe it would serve the public interest to seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Lumberton, Mississippi, as reflected below:

City	Channel No. Present	Proposed
Lumberton, Mississippi	237C2	237C1

4. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Capitol Broadcasting
Corporation
917 Western American Cir.
Mobile, Alabama 36609
(Licensee of Station
WKSJ-FM)

Laura B. Humphries
P.O. Box 1913
Morristown,
New Jersey 07962-1913
(Assignee of license for
Station WKSJ-FM)

Griffin Broadcasting
Corporation
832 Patrigde Lane
Albany, Georgia 31707
(Licensee of Station WJDB-
FM)

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 13, 1992,** and reply comments on or before **November 30, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John S. Neely
Miller & Miller, P.C.
P.O. Box 33003
Washington, D.C. 20033

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

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[1] The license for Station WLUN was modified in MM Docket 89-577 to specify operation on Channel 237C2 in lieu of Channel 237A. *See* 5 FCC Rcd 5269 (1990). Petitioner holds a construction permit for Channel 237C2 (BPH-901116IC) that expires on September 26, 1992.

[2] The coordinates for Channel 237C1 are 30-39-34 and 89-09-59.

[3] *See Report and Order* released July 15, 1992 (57 FR 31970, July 20, 1992).

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 14, 1992

Released: September 22, 1992

David J. Armstrong, Vice President and General Manager — 8310-MEA 91120649
WTMJ, Inc.
Radio Station WIFC(FM)
602 Jefferson Street
Wausau, WI 54401

Dear Mr. Armstrong:

This letter constitutes a NOTICE OF APPARENT LIABILITY for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and Section 73.1211 of the Commission's Rules. This action is being taken under the authority delegated to the Chief, Mass Media Bureau, pursuant to Section 0.283(c)(3) of the Commission's Rules.

By letter dated November 21, 1991, the Commission requested that you respond to an allegation that WIFC(FM) was airing commercial announcements on behalf of Grand Royale Casino in Mole Lake, Wisconsin, in violation of 18 U.S.C. Section 1304 and Section 73.1211 of the Commission's Rules.

Your response to the inquiry included scripts of all commercial messages aired on behalf of Mole Lakes Grand Royale Casino from June 22, 1991, through July 6, 1991, and from August 1, 1991, through August 3, 1991. These scripts promoted gaming activities in the form of "Las Vegas-style games." A staff compilation based on the scripts and air dates you provided resulted in a finding that two scripts were used in promoting the Grand Royale Casino on eighteen (18) separate dates between June 22, 1991, and August 3, 1991.

The Indian Gaming Regulatory Act of 1988 provides that Title 18 U.S.C. Section 1304 shall not be applied to any Class III game[1], such as those advertised here, conducted in accordance with state law by an Indian tribe on tribal lands, as long as a tribal-state compact is in effect. A compact is in effect upon notice of approval by the Secretary of the Interior, as published in the Federal Register. You state that information made available to you reveals that the State of Wisconsin has not entered into such an agreement with the Sakaogon tribe, which operates the subject gaming operation. Thus, you acknowledge that broadcast of announcements for casinos in Wisconsin is in violation of Section 1304.

You state that WIFC(FM) did reject advertising spots for Class III games, and believed that those broadcast were for Class II games[2], which are legal. You claim that WIFC(FM) aired spots as edited based on its understanding that the Grand Royale Casino conducted Class II games (as well as Class III games) and thus that general references to the casino were permissible. You claim that this understanding is supported in the Commission's October 22, 1991, declaratory ruling to the Wisconsin Broadcasters Association (WBA).

We note, however, that in WBA's September 20, 1991, request for a ruling, its enclosed commercial only referred to "Vegas-style excitement," which, in a multi-use establishment, could be taken as a reference to non-lottery activities, and made no mention of gaming. Accordingly, in response, the Commission stated in its October 22, 1991, declaratory ruling that "this phrase may be used in broadcast commercials provided the activities of the establishments being advertised are either non-lottery or are in compliance with the Indian Gaming Regulatory Act." However, we note that WIFC's "Grand Opening 2" script (WTMJ, Inc., response, Exhibit I), describes not "Vegas-style excitement" but, in contrast, "Vegas-style games," thereby indicating that Class III games were being conducted.

Additionally, you state that after receiving the Commission's letter of inquiry, WIFC(FM) investigated the activities of the Grand Royale Casino and learned, for the first time, that it conducts only Class III games. You state that WIFC(FM) has since refused to accept any new spots for Grand Royale Casino unless and until the state-tribe compact takes effect. You state that WIFC(FM) has acted in good faith to guard against the broadcast of lottery promotions by carefully reviewing and editing the submitted announcements for each promotion, and by refusing to carry spots that it believed were unlawful.

In view of the foregoing, it appears that Station WIFC(FM) willfully and repeatedly violated 18 U.S.C. Section 1304 and 47 C.F.R. Section 73.1211 on an almost daily basis beginning on June 22, 1991, and continuing through July 6, 1991, and between August 1 through August 3, 1991, by airing announcements promoting casino gaming activity (lotteries) on behalf of the Grand Royale Casino at Mole Lake, Wisconsin. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, WTMJ, Inc. is hereby advised of its apparent liability for a forfeiture of six thousand two hundred and fifty ($6,250.00) dollars.

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act and the guidelines described in the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied* FCC 92-212. Under these standards, the forfeiture is being reduced below the amount which could have been assessed given the repeated nature of the violations because we find that your conduct was in good faith. You demonstrated this good faith by checking with WBA on permissible advertisements, rejecting later advertisement spots, and editing copy of current advertisements.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and all affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] The term "class III gaming," as defined by the "Indian Gaming Regulatory Act," includes all forms of gaming that are not class I gaming or class II gaming. Typically, casino games such as blackjack, roulette, poker, and slot machines are considered class III games.

[2] Under the "Indian Gaming Regulatory Act" the term "class II gaming" is defined as: 1) the game of chance commonly known as bingo (and similar games); 2) card games that are explicitly authorized by the laws of the State or are not explicitly prohibited by the laws of the State.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Domestic Automation Company File No. 774849
Fresno, California

for a waiver of the Rules to allow
a multiple address system
with multiple master stations
operating at separate locations
on narrow bandwidth sub-channels

WAIVER

Adopted: September 9, 1992; Released: September 22, 1992

By the Chief, Private Radio Bureau:

1. Domestic Automation Company (Domestic) seeks a waiver of Sections 94.3, 94.15, and 94.65 of the Commission's Rules, 47 C.F.R. § 94.3, 94.15(d), and 94.65(a)(1), to permit a multiple address system (MAS) with multiple master stations operating at separate locations on narrow bandwidth sub-channels offset from assignable MAS frequencies in the Private Operational-Fixed Microwave Service (OFS). Section 94.3 defines an MAS system as a single master station with at least four corresponding remote stations. Section 94.15(d) requires that MAS stations be assigned frequencies listed in Section 94.65(a)(1).

2. Domestic has filed the captioned application in the OFS, requesting authority to operate an MAS system with multiple master stations at locations displaced up to 20 miles from the center of the system. These masters would operate on ten 1.2 kHz sub-channels, centered on and offset from the assignable frequencies on 2.083 kHz intervals, each modulated to accommodate a digital capacity of 2.4 KBPS. The masters would operate with an effective isotropic radiated power (EIRP) limited to 46 dBm, reduced 7 dB from that normally permitted (53 dBm) and a frequency tolerance of 0.0001%, closer than that normally permitted (0.00015%). The antenna heights of the masters would be reduced to those needed to reach service areas of 2 to 3 miles radius. The minimum aggregate digital capacity of the system with 10 masters in use would be 24 KBPS. Domestic could exercise frequency reuse such that the system would comprise up to 50 masters with an aggregate digital capacity of 120 KBPS.

3. Domestic plans to accommodate several thousand remotes with the proposed system. It would provide private carriage under the provisions of Section 94.17 for banks with credit card verification requirements, burglar alarm companies with alarm monitoring needs, and electric utilities with distribution management requirements. Domestic certifies that it will operate a master and at least four corresponding remotes on each sub-channel within the first year of operation.

4. In support of its request, Domestic states that its use of multiple dispersed masters on sub-channels results in an extremely efficient use of MAS spectrum, providing at least 5 times more capacity than older 4.8 KBPS systems found on 25 kHz channels. Moreover, its use of reduced EIRP and lower master antenna heights would present less potential for interference to neighboring systems. Finally, Domestic certifies, based upon frequency engineering analysis, that its proposed MAS system will not cause harmful interference to any existing or applied-for systems, since its proposed system is not co-channel with any such systems whose master station is within 90 miles of Domestic's center of operation.

5. In this case, Domestic has demonstrated that its system would use MAS spectrum more efficiently than systems normally accommodated on a 25 kHz channel. We note that the capacity of modern MAS systems varies from 9.6 to 19.2 KBPS, higher than the 4.8 KBPS capacity cited by Domestic for older systems. But Domestic's proposed digital capacity, varying from 24 KBPS to 120 KBPS, still represents a significant increase in efficiency in the use of MAS spectrum. We agree that its use of lower EIRP, tighter tolerance, and lower master antenna heights, and the restriction of its masters to locations within 20 miles of the center of the system should present an interference potential lower than that of a normal system.

6. Domestic proposes a unique system that cannot be properly accommodated in the Rules. The proposed system is the only alternative available that would allow Domestic to provide a high digital capacity without undermining the purpose of the Rules waived, which is to promote the efficient use of MAS spectrum. We find that the proposed operation would further the purpose of the Rules waived and that it would be in the public interest. *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

7. Pursuant to Section 0.331, 47 C.F.R. § 0.331, and Section 1.3, 47 C.F.R. § 1.3, Domestic Automation Company's request for waiver of Sections 94.3, 94.15(d), and 94.65(a)(1) of the Commission's Rules, 47 C.F.R. §§ 94.3, 94.15(d), and 94.65(a)(1), for the referenced applications IS GRANTED for an indefinite term.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 16, 1992

Released: September 23, 1992

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Michael Schatz, Vice President & General Manager
Quaker State Broadcasting Corp., Licensee
Radio Station WTPA(FM)
P.O. Box 9350
Harrisburg, PA 17108

8310-SP
92030339
92050698

Dear Mr. Schatz:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, for the willful violation of Section 73.1216 of the Commission's Rules.

On March 9, 1992, the Commission received a complaint alleging that Station WTPA(FM) conducted the WTPA/Hifi House Gold Medal Giveaway contest in February of 1992. The complainant asserted that he won the contest; however, the contest rules promised a $2,000 big screen television set as a prize and he was instead awarded a smaller television set worth less than $1,100.

Based on this complaint, the Commission sent you a letter of inquiry on April 24, 1992. In your May 28, 1992, response you state that our letter of inquiry was the first knowledge that WTPA management had of questions about the value of the prize. You began an investigation and discovered that the television set actually awarded was of lower value than the $2,000 television set promised in the contest promotions. You state that Station WTPA has awarded the complainant additional merchandise, making the total value of his prize equal $2,000. The complainant advises that this adjustment is satisfactory to him.

Section 73.1216 of the Commission's Rules provides:

> A licensee that broadcasts or advertises information about a contest it conducts shall fully and accurately disclose the material terms of the contest, and *shall conduct the contest substantially as announced or advertised*. No contest description shall be false, misleading or deceptive with respect to any material term. (Emphasis added.)

Based on the facts of this case, it is clear that the value of the prize initially awarded to the contest winner was considerably lower than the $2,000 television set promised in the broadcast contest promotions. For this reason, Station WTPA(FM) failed to conduct the contest substantially as announced or advertised in that a different television set was awarded than was described in contest announcements.

In view of the foregoing and pursuant to Section 503(b) of the Communications Act of 1934, as amended, you are hereby advised of your apparent liability for a forfeiture of six thousand, two hundred and fifty dollars ($6,250) for your willful violation of Section 73.1216 of the Commission's Rules. The amount of the forfeiture was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act and in our August 1, 1991, *Policy Statement on Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) *recon. denied* FCC 92-212 (June 4, 1992). Under these standards, $6,250 is the base forfeiture amount for a violation of Section 73.1216 of the Commission's Rules.

In regard to this forfeiture proceeding, you may, within thirty (30) days of the date of this Notice, take any of the actions set forth in Section 1.80 of the Commission's Rules as summarized in the attachment to this letter. Any comments relating to your ability to pay should include those financial items set forth in said attachment.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-92-075

For authority Pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 504 (c)(3) of the International Maritime Satellite Telecommunications Act to establish and operate channels of communications for use in the provision of compressed video service via the Inmarsat system

MEMORANDUM, OPINION, ORDER AND AUTHORIZATION

Adopted: September 4, 1992; Released: September 23, 1992

By the Chief, International Facilities Division:

1. On January 2, 1992, Communications Satellite Corporation (Comsat) filed an application pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 504 (c)(3) of the International Maritime Satellite Telecommunications Act for authority to establish and operate channels of communications for use in the provision of an off-peak, preemptible, point-to-multipoint compressed video service in the shore-to-ship direction via the Inmarsat system. The application was placed on public notice on January 8, 1992, and no oppositions were received.

2. Comsat requests authority to provide compressed video service in the Inmarsat Atlantic Ocean Region-East (AOR-E) and Atlantic Ocean Region-West (AOR-W) through Comsat's land earth station (LES) in Southbury, Connecticut (WA-28), and in the Pacific Ocean Region (POR) through Comsat's LES in Santa Paula, California (KA-31). Unlike Comsat's previously authorized compressed video service,[1] the new service has the primary advantage of using a ship's existing Inmarsat-A antenna to receive video transmission without interfering with the ship's other Inmarsat communications. The compressed video signal of nominally 300 Kbps represents an approximately 99.5 percent compression of a full broadcast video signal. The transmissions will occupy a bandwidth of 450 KHz, the equivalent of 20 telephony channels, and will require the equivalent power of 6 telephony channels. QPSK modulation will be employed. Transmissions will occur within Comsat's existing assigned Inmarsat maritime frequencies and will utilize existing Inmarsat space segment and LES facilities. Comsat proposes to make the compressed video service available in three forms: (1) basic compressed video service for customers providing the necessary video equipment and programming, (2) the needed equipment as well as the satellite channel for customers not wishing to obtain their own equipment, and (3) news and sports programming on subscription and per event bases.[2] The service will be available on an off-peak basis, and will be fully preemptible if the satellite capacity is needed to provide safety service or other demand-assigned communications services. Comsat states that accounting and cost allocation will be performed in accordance with Comsat's existing standardized Commission-approved procedures. Rates governing the service will be established by tariff filings based on the same ratemaking methodologies used for Comsat's other Inmarsat system service offerings, and will cover its capital investment and operating expenses related to the use of satellite capacity and LES facilities. Comsat also states that the service will be available on a nondiscriminatory basis.

3. Comsat says that this service offers a highly efficient and technologically advanced means of transmitting news, sports, and other programming, including real-time coverage of major national and international news events, to government and cruise ships and other large maritime vessels with increased compression and reduced satellite power and bandwidth. Although the viewing quality is less than that of home television, Comsat alleges that the quality is sufficient to make the service attractive to shipboard viewers. It will enable customers to make more effective use of their investments in Inmarsat-A terminals. According to Comsat, this service will meet critical defense and crew morale needs because since the Gulf War, the Navy has made it a high priority to equip its command vessels with the capability to receive regular news reports. Comsat concludes that this service will broaden its overall service offerings, enabling it to compete more effectively with foreign Inmarsat signatories for the general communications traffic of cruise ships and other large maritime customers. It will also increase the traffic base over which Comsat's fixed costs are spread.

4. We conclude that it will be in the public interest to grant Comsat authority to establish and operate channels of communications for use in the provision of a basic off-peak, preemptible, point-to-multipoint compressed video service in the shore-to-ship direction via the Inmarsat system in the AOR-E and AOR-W through Comsat's LES in Southbury, Connecticut (WA-28), and in the POR through Comsat's LES in Santa Paula, California (KA-31). Grant of this application will promote American competitiveness and advance the larger and more effective use of radio spectrum resources. It will also facilitate U.S. participation in the development and provision of an important new communications technology.

5. Comsat also seeks authority to provide the needed equipment and programming associated with this service. In a related proceeding, File No. I-S-P-92-001, Comsat has requested a declaratory ruling or a waiver to enable it to provide shipboard equipment and programming to be used

[1] Communications Satellite Corporation File No. I-T-C-86-087, mimeo no. 5737, released July 15, 1986.

[2] In order to receive the television programming, Comsat states that it will acquire and install at each LES a 3.5 meter dual-feed (C and Ku band) receive-only antenna, C and Ku band low noise block converters, broadcast video receivers, and associated monitoring and installation hardware, totalling less than $100,000 per LES.

in conjunction with maritime communications services.[3] Although Comsat argues that its provision of equipment and programming is consistent with the *Comsat Structure Orders*,[4] the issue of Comsat's provision of this equipment and programming will be considered in File No. I-S-P-92-001. Therefore, we need not here address Comsat's request to provide equipment and programming in conjunction with its compressed video service. We defer action on that portion of Comsat's application that requests authority to provide equipment and programming to File No. I-S-P-92-001.

6. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. 214, and Section 504 (c)(3) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. 753(c)(3), that the application of Communications Satellite Corporation, File No. I-T-C-92-075, IS GRANTED IN PART and Comsat is authorized to establish and operate channels of communications for use in the provision of a basic off-peak, preemptible, point-to-multipoint compressed video service for customers providing their own necessary video equipment and programming in the shore-to-ship direction via the Inmarsat system in the AOR-E and AOR-W through Comsat's LES in Southbury, Connecticut (WA-28), and in the POR through Comsat's LES in Santa Paula, California (KA-31).

7. IT IS FURTHER ORDERED that Comsat's request to provide equipment and programming in conjunction with its compressed video service is deferred and will be considered in File No. I-S-P-92-001.

8. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, 47 U.S.C. 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that Comsat shall file and have in effect a tariff for the service authorized in this order before offering services to the public.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[3] Petition of Communications Satellite Corporation for Declaratory Ruling or, In the Alternative, for Partial Waiver of Structural Separation Requirements, File No. I-S-P-92-001, filed November 27, 1991, at 11.

[4] Changes in the Corporate Structure and Operations of the Communications Satellite Corporation, 90 FCC 2d 1159 (1982), recon. denied, 93 FCC 2d 701 (1983), Second Memorandum Opinion and Order, 97 FCC 2d 145 (1984), recon. granted in part, 99 FCC 2d 1040 (1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

COAST TV	**MM Docket No. 84-934** File No. BPCT-840720KG
MISSION BROADCASTING CORPORATION	**MM Docket No. 84-935** File No. BPCT-840723KI
SOLAR TELEVISION, INC.	**MM Docket No. 84-936** File No. BPCT-840723KJ

For Construction Permit
for New Television Station
Santa Barbara, California

MEMORANDUM OPINION AND ORDER

Adopted: September 10, 1992; Released: September 22, 1992

By the Review Board: MARINO (Chairman), and ESBENSEN. Board Member BLUMENTHAL dissenting.

1. This proceeding involves the mutually exclusive applications of Coast TV (Coast), Mission Broadcasting Corporation (Mission), and Solar Television, Inc. (Solar) for authority to construct a new television station in Santa Barbara, California. At present, the proceeding is before the Review Board on exceptions to the *Supplemental Initial Decision* (S.I.D.), FCC 92D-9, released February 12, 1992, of Administrative Law Judge Edward Luton (ALJ), to whom the case had been remanded by the Board on issues to determine whether Solar is financially qualified to be a licensee, and whether Solar falsely certified its financial qualifications. *See Coast TV*, 5 FCC Rcd 6721 (Rev. Bd. 1990) (Remand Order). The ALJ resolved the remanded issues unfavorably to Solar and denied its application. Solar excepts to these conclusions and further argues that the ALJ erred in rejecting its December 21, 1990 motion to add financial and financial certification issues against Mission. Coast supports Solar's disqualification but excepts to the ALJ's refusal to enlarge the issues against Mission, and joins Solar in urging that the proceeding now be remanded for that purpose. In a statement in lieu of exceptions, Mission asserts that it construes the S.I.D. as having the practical effect of confirming the Board's earlier pre-remand grant of Mission's application. *See Coast TV*, 2 FCC Rcd 2982 (Rev. Bd. 1987). Upon review of these pleadings and the underlying record, we are constrained to hold that the proceeding must be remanded once again in order to determine Mission's basic qualifications to be a licensee.

2. In our Remand Order, we noted Solar's contention "that any financial issue added against it would apply equally to Mission," 5 FCC Rcd at 6720, and held that "In light of our remand . . . and in order to preclude the possibility that similarly situated applicants could be afforded disparate treatment, we will authorize the ALJ to revisit the matter and decide whether the issues should be enlarged against Mission as well. *See Albert E. Gary*, [5 FCC Rcd 6235, 6237] at para. 12." Remand Order, 5 FCC Rcd at 6722. Following our remand, on December 21, 1990, Solar moved to formally enlarge the issues to add financial and false certification issues against Mission. Pointing out that Coast had previously sought a financial issue against Mission on February 4, 1985 (at the time of the original hearing), Solar alleged that Mission's 1984 loan commitment letter from Crocker National Bank did not provide reasonable assurance, and that the bank had since gone out of existence. Reading the Board's Remand Order narrowly and as not requiring reconsideration of his denial of financial issues against Mission at the time of the original hearing, the ALJ held that Solar's motion did not require new issues. *Memorandum Opinion and Order*, FCC 91M-559, released February 14, 1991. He noted that Mission had submitted a letter from Wells Fargo Bank stating that it had merged with Crocker National Bank and that "the merger . . . should not have altered the 1984 letter." He also rejected Solar's allegations that the letter was a mere accommodation or was defective in any way. *Id.* Finally, the ALJ, in a related *Memorandum Opinion and Order*, FCC 91M-1359, released April 19, 1991, also denied a motion filed March 8, 1991, by Coast, which also sought financial and financial certification issues against Mission. Noting that Coast was now seeking to attack the sufficiency of Mission's bank letter, which was first revealed to the parties on February 25, 1985, the ALJ held that Coast had offered no justification for raising this matter at this late date. *Id.*

3. In remanding this proceeding, it was the Board's intention, with respect to Mission, that the ALJ review the question of whether that applicant is financially qualified, a matter which had been raised at the time of the original hearing. This question must be addressed in the context of prevailing Commission standards which hold that applicants such as Mission, who certify to their financial qualifications, must have reasonable assurance of financing at the time of certification. *Aspen FM, Inc.*, 6 FCC Rcd 1602 (1991); *Northampton Media Associates*, 4 FCC Rcd 5517, 5518 (1989) (subsequent history omitted). Here, Mission places sole reliance on the following letter from Crocker National Bank to establish sufficient available funds to meet anticipated costs:

Mr. Robert Lewis Thompson
WOOD, LUCKSINGER & EPSTEIN
2000 M Street, N.W., Suite 500
Washington, D.C. 20036

Re: Mission Broadcasting Corporation

Dear Mr. Thompson:

The Crocker Bank (the Bank) could provide $2,000,000 in loans to Mission Broadcasting Corporation (The Corporation) for the purpose of constructing a television station in Santa Barbara, California.

Subject to the foregoing, our willingness to lend this amount to the Corporation would be contingent upon the following and not limited to:

1. The Corporation successfully obtains approval from the Federal Communications Commission (FCC) to construct and operate such television station in the Santa Barbara area.

2. (a) All reasonable and ordinary credit criteria of the Bank are met by the Corporation; (b) the Corporation receives a construction permit; (c) the Corporation requests a lending commitment from the Bank; (d) the Corporation executes all customary documentation normally required by the Bank for credits of this type, including opinions of attorneys and accountants, and guarantors and collateral documents acceptable to the bank.

Cordially yours,

CROCKER NATIONAL BANK

Patrick T. Caswell
Associate Account Manager

4. On its face, this letter raises material and substantial questions as to "the validity and substance of the applicant's original financial proposal at the time of certification." *Aspen FM*, 6 FCC Rcd at 1603. The relevant financial inquiry is as follows:

> Thus, in order for the Board to determine that an applicant has "reasonable assurance" of "committed sources of funds" from a lending institution, we will review the following factors: Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 509 F.2d 1117 (D.C. Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been preliminarily reviewed, *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been demonstrated, *Chapman Radio*, *supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.

Scioto Broadcasters Limited Partnership, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 1893 (1991); *accord*, *Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314, 6322 (Rev. Bd. 1990).

5. While we accept on the present record the ALJ's finding that Crocker's successor bank has stated that the letter remains in effect, the letter itself appears woefully deficient in that it does not "specifically identif[y]" most of the significant terms including interest rate, terms of repayment, and collateral requirements. Moreover, the letter (which is not addressed to the applicant, but to its counsel) does not indicate either that any longstanding relationship exists between borrower and lender, or that the applicant has provided sufficient information about itself which the bank has reviewed to its satisfaction so as to provide reasonable assurance that the loan will be forthcoming. *Scioto*, 5 FCC Rcd at 5160; *see Marlin Broadcasting of Central Florida*, 5 FCC Rcd 5751 (1990). This case is thus unlike our recent holding in *Sumter Radio Partners*, 7 FCC Rcd 2573 (Rev. Bd. 1992), where the original bank letter, *inter alia*, specified interest and repayment terms, was clarified in a subsequent letter, and where the letter's author stated that he had closely reviewed the applicant's proposed collateral, and that the bank had a long and established relationship with the applicant's principals. The situation here also differs from *Salt City Communications, Inc.*, 7 FCC Rcd 4221 (Rev. Bd. 1992), where the original financing letter included the terms of repayment and stock pledge and personal guarantee requirements, and was followed by two subsequent letters clarifying and modifying the original terms, and where the applicant provided detailed information about itself in order to satisfy the lender, and, in turn, was informed of and accepted all of the lender's terms and conditions. On the present record in the case before us, we are not sufficiently informed as to whether there is any comparable understanding between the lender and applicant here to overcome the apparent deficiencies on the face of the availability letter.

6. Finally, we do not agree with Mission's argument (Reply Br. at 4-9) that *res judicata* bars issue enlargement. Our Remand Order expressly "authorize[d] the ALJ to revisit [Mission's financial qualifications] and decide whether the issues should be enlarged against Mission as well." 5 FCC Rcd at 6722. Had we believed the matter was barred by laches, we would have said so at that time. *See also Goodlettsville Broadcasting Company, Inc.*, 7 FCC Rcd 1833, 1835 para. 8 (Rev. Bd. 1992). We will direct the ALJ to conduct further hearing on the issues specified below and to issue a further supplemental I.D. In the interim, we will hold in abeyance the exceptions pertaining to Solar's qualifications so that we may issue a single Decision addressing the qualifications of both applicants.

7. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the presiding judge for further hearing and the preparation of a further Supplemental Initial Decision on the following issues:

> To determine whether Mission Broadcasting Corporation is financially qualified to be a Commission licensee.
>
> To determine whether Mission Broadcasting Corporation falsely certified its financial qualifications and, if so, the effect thereof on its qualifications to be a Commission licensee.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

VICTORIA CELLULAR TELEPHONE COMPANY — File No. 02222-CL-MP-92

For modification of facilities in the Domestic Cellular Public Land Mobile Radio Service in Victoria, Texas, Market 300 on frequency block A, call sign KNKA730

MEMORANDUM OPINION AND ORDER

Adopted: September 15, 1992; Released: September 23, 1992

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Victoria Cellular Telephone Company (Victoria) filed an application, to build a new cell (cell site 4) and modify an existing cell in the Victoria, Texas, Metropolitan Statistical Area (MSA), on November 5, 1991. Four Petitions to Deny were filed by the adjacent licensees.[1] Responsive pleadings were timely filed. For the reasons set forth below, we grant Victoria's application.

II. DISCUSSION

2. Victoria proposed in its application to increase the power at cell site 2, which is near the Victoria MSA border with the Texas 20 Rural Service Area (RSA). The resulting cell contour would have extended for at least 25 percent of its coverage into the Texas 20 RSA. Victoria later amended its application to reduce the requested contour extension. During the course of settlement negotiations, Texas 20A, the licensee on Block A in Texas 20, agreed to accept the amended contour extension.

3. An agreement regarding a cell's contour extension between adjacent, co-channel licensees removes the proposed cell from the *de minimis* category. *Bell Atlantic Mobile Systems of Philadelphia*, 64 RR2d 536 (Mobile Serv. Div. 1987) (where the Mobile Services Division permitted an extension into an adjacent MSA when the adjacent licensee gave its permission); *Orange County-Poughkeepsie Limited Partnership*, 3 FCC Rcd 1191 (Mobile Serv. Div. 1988) (where the Mobile Services Division did not evaluate the de minimis nature of a contour because there was an agreement). Because Texas 20A, the adjacent, co-channel licensee with Victoria, has agreed to accept Victoria's proposed contour incursion, we need not review this application as a *de minimis* case. Under existing case law, Victoria's proposed extension is permissible. Therefore, we deny Texas 20B2's Petition. Accordingly, we will grant Victoria's application.

III. ORDERING PARAGRAPHS

4. IT IS HEREBY ORDERED THAT Victoria Cellular Telephone Company's application, File No. 02222-CL-MP-92, IS GRANTED; and,

5. IT IS FURTHER ORDERED THAT the Petition to Deny filed by Texas 20 B2 Limited Partnership against the application filed by Victoria Cellular Telephone Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

[1] The four petitioners include: Texas 16 Cellular Telephone Company, the Texas 16 RSA Block A licensee, and GTE Mobilnet of Texas RSA #16 Limited Partnership (GTE), the Texas 16 RSA Block B licensee, both of whom petitioned Victoria's proposed new cell site 4. With regard to cell 4, as proposed by Victoria, this cell has been dismissed from the application, by an amendment filed August 18, 1992. Thus, the GTE and Texas 16 petitions have been rendered moot. The other two petitioners are Texas 20 B2 Limited Partnership (Texas 20B2) and Texas RSA #20 Rural Cellular, Inc. (Texas 20A). With regard to cell 2, Texas 20A has agreed to accept the contour extension into the Texas 20 RSA proposed by Victoria. Therefore, Texas 20A has withdrawn its Petition.

Before the
Federal Communications Commission
Washington, D.C. 20554

Application for Review of Call Sign Assignments for Public Coast Stations filed by Global Communications, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: September 9, 1992; Released: September 23, 1992

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review (Application) filed by Global Communications, Inc. (Global). The Application requests that the Commission set aside a *Memorandum Opinion and Order* (*Order*), 6 FCC Rcd 4887, (1991), issued by the Chief, Special Services Division, Private Radio Bureau which denied Global's Petition for Assignment of Public Coast Station Call Letters (Petition). This action denies Global's request.

II. BACKGROUND

2. In its Petition, Global requested authority to use the three-letter call sign, "WCT," for its public coast station[1] located in San Juan, Puerto Rico. The call sign WCT was previously assigned to an American Telephone & Telegraph Co. (AT&T) public coast station located in the same area serving both ships in local waters and on the high-seas. AT&T was authorized to discontinue service from WCT by the Commission's Common Carrier Bureau on March 19, 1991, 6 FCC Rcd 1580 (1991).

3. On August 16, 1991, the Chief, Special Services Division, Private Radio Bureau released an *Order* denying Global's request, citing Section 2.302 of the Commission's Rules, 47 C.F.R. § 2.302, and noting that three-letter call signs were assigned only to public coast stations with high frequency assignments and, typically, worldwide operations. Global subsequently filed a timely Application for Review, asking that we set aside the *Order* and grant its request for the three-letter call sign WCT for its San Juan, Puerto Rico public coast station.[2] No comments opposing the request were filed.

III. DISCUSSION

4. In the previous *Order*, the Chief, Special Services Division relied on Section 2.302 of the Rules to deny Global's request for a three-letter call sign. Section 2.302 specifies, among other things, that a three-letter call sign will only be assigned to a "Class I coast station."[3] Global argues that the term "Class I coast station," as it appears in Section 2.302, is no longer used in the rules governing the maritime services (47 C.F.R. Part 80). While this term is not specifically used in Part 80, as a practical matter, differences in the types of services offered by public coast stations still exist. For example, some offer only local (VHF) service and some offer only high seas (HF) service and our Licensing Division continues to assign call signs on this basis.

5. Further, we have long maintained a policy to deny requests for specific call signs in the maritime services[4] because of the potential adverse impact on our licensing resources.[5] Granting Global's request would set a precedent that could result in a substantial administrative burden. For example, there are approximately 10,000 coast stations, private and public, that could request a specific call sign. This is a burden that our limited resources could not handle without substantially increasing the time required to process coast station applications. Although Global claims to rely on the call sign for name recognition, VHF public coast stations are not required to identify by call sign. Such stations may identify by means of the approximate geographic location where there is no conflict with other stations. Global could identify, for example, as San Juan marine operator rather than use its call sign.

6. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 5(c)(5) and 303(o) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5) and 303(o), and Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), that the Application for Review filed by Global Communications, Inc. IS DENIED, and Global's Petition for Assignment of Public Coast Station Call Letters WCT IS DENIED.

7. IT IS FURTHER ORDERED THAT this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[1] Public coast stations provide maritime public correspondence communications to ships and boats. These stations are authorized to provide local area service on very high frequency (VHF) bands, regional service on medium frequency (MF) bands, and worldwide highseas service on high frequency (HF) bands.

[2] Global's public coast station presently is assigned the call sign KMD 214 and is authorized to operate on VHF, essentially a short range service.

[3] Section 2.302 specifies that three letter call signs will be issued to Class I coast stations, that is, coast stations that provide high seas radiocommunications services.

[4] *See*, for example, In re *Stanley S. Hubbard*, 69 FCC 2d 1194 (1978), and In re *Stanley S. Hubbard*, 50 Rad. Reg. (P & F) 1277 (1982).

[5] Under our current coast station licensing system, call signs are generated by computer from an existing data base of available combinations and issued sequentially based on the service provided. The system requires only three work years annually and is orderly, fair, and efficient. It enables us to maintain reasonable speeds of service in spite of increasing workload.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICALL SYSTEMS OF LOUISVILLE,
Complainant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant.

File No. E-91-009

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: September 16, 1992; Released: September 23, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On October 3, 1990, Americall Systems of Louisville (Americall) filed the above-captioned formal complaint against Southwestern Bell Telephone Company (SWBT) seeking damages resulting from SWBT's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On September 3, 1992, however, Americall filed a motion for leave to withdraw the complaint stating that it is not economically prudent for it to continue pursuit of this complaint and there is no longer any necessity for this proceeding.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Americall's Motion for Leave to Withdraw Complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED and the proceeding IS TERMINATED.

5. IT IS FURTHER ORDERED that Americall's Application for Review in the above-captioned proceeding IS DISMISSED.

[1] Americall filed an application for review of an order holding this complaint in abeyance. *Order*, 6 FCC Rcd 698 (Com.Car.Bur. 1991). Because the complaint is being withdrawn, the application for review is moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS, INC.,
Complainant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant.

File No. E-91-25

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: September 16, 1992; Released: September 23, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On October 29, 1990, Cable & Wireless, Inc., ("Cable & Wireless") filed the above-captioned formal complaint against Southwestern Bell Telephone Company ("Southwestern Bell") seeking damages resulting from Southwestern Bell's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On August 31, 1992, however, the complainant filed a motion seeking dismissal of the complaint with prejudice stating that all claims in the action against Southwestern Bell have been settled.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934 as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Motion to Dismiss IS GRANTED, the above-captioned complaint IS DISMISSED WITH PREJUDICE, and the proceeding IS TERMINATED.

4. IT IS FURTHER ORDERED that Cable & Wireless' Application for Review filed in the above-captioned proceeding IS DISMISSED.

[1] Cable & Wireless filed an application for review of an order holding the above-captioned proceeding in abeyance. *Order*, 6 FCC Rcd 697 (Com. Car. Bur. 1991). Because the underlying dispute has been resolved by agreement between the parties, the application for review is moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ADVANCED TELECOMMUNICATIONS CORPORATION, a/k/a ATC Long Distance, and its subsidiaries,
Complainant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendant.

File No. E-90-357
File No. E-91-70

ORDER

Adopted: September 16, 1992; Released: September 23, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On May 25, 1990 and March 19, 1991, respectively, Advanced Telecommunications Corporation, a/k/a ATC Long Distance Corporation, and its subsidiaries, ("complainant") filed the above-captioned formal complaints against Southwestern Bell Telephone Company ("Southwestern Bell") seeking damages resulting from Southwestern Bell's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On September 10, 1992, however, the complainant filed motions seeking dismissal of the complaints with prejudice stating that all claims in the actions against Southwestern Bell have been settled.

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934 as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Motions to Dismiss ARE GRANTED, the above-captioned complaints ARE DISMISSED WITH PREJUDICE, and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Nonsubstantive and editorial amendments of Part 80, Subpart W of the Commission's Rules regarding the Global Maritime Distress and Safety System (GMDSS).

ORDER

Adopted: September 17, 1992; Released: September 23, 1992

By the Chief, Private Radio Bureau:

1. On February 7, 1992, the Commission released a *Report and Order* that implemented the Global Maritime Distress and Safety System (GMDSS) in the Commission's Rules. *Report and Order*, PR Docket No. 90-480, FCC 92-19, 7 FCC Rcd 951 (1992), 57 Fed. Reg. 09063 (1992). At the same time, the International Maritime Organization (IMO) was updating the GMDSS performance standards in the Safety of Life at Sea (SOLAS) Convention. Additionally, the performance standards being considered by the Commission simultaneously were being reviewed by the Federal Register under special procedures for "incorporation by reference." Minor differences among the various documents resulted.

2. The international standards now have been updated and we have reviewed the status of all performance standards incorporated by reference in the Rules. Actual changes to the standards were minor or editorial in nature and should have minimal affect, if any, on subject equipment. Thus, 47 C.F.R. § 80.1101 is updated to be consistent with the latest international standards. For clarity Section 80.1101 is revised in its entirety. The notable changes, however, are as follows: IMO Resolution A.700(17) is added to paragraph (c)(4) for MF/HF narrowband direct-printing (NBDP) radio equipment; IMO Resolution A.698(17) replaces IMO Resolution A.608(15) in paragraph (c)(8) for INMARSAT-A ship earth stations (SESs); and the CCIR Recommendation 493-4 reference in paragraphs (c)(8) and (c)(9) is deleted for INMARSAT SESs.

3. On a related matter, we are also clarifying that emergency position-indicating radiobeacons operating on 406 MHz (406 MHz EPIRBs) that were authorized prior to April 15, 1992 (the effective date of the *Report and Order*) and meet the GMDSS performance standards are exempt from the GMDSS labeling requirement. They may be added to the list of GMDSS-approved equipment by simply submitting a letter. This provision for 406 MHz EPIRBs was stated in the text of the *Report and Order* but it was not reflected in the Rules. See *Report and Order*, footnote 39. Therefore, 47 C.F.R. § 80.1103 is amended to clarify this point.

4. Because the rule amendments adopted herein are nonsubstantive in nature, the notice and comment procedures and the 30 day effective date provisions of Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, need not be complied with. Authority for this action is contained in Section 0.331(a)(1) of the Commission's Rules, 47 C.F.R. § 0.331(a)(1).

5. Accordingly, Part 80 IS AMENDED as set forth in the attached Appendix effective upon publication in the Federal Register.

6. Regarding questions on matters covered in this document, contact Kathryn S. Hosford at 202-632-7197.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

APPENDIX

Part 80 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.1101 is amended in its entirety to read as follows:

§ 80.1101 Performance standards

(a) The abbreviations used in this section are as follows:

(1) International Maritime Organization (IMO).

(2) International Telegraph and Telephone Consultative Committee (CCITT).

(3) International Electrotechnical Commission (IEC).

(4) International Organization for Standardization (ISO).

(5) International Radio Consultative Committee (CCIR).

(b) All equipment specified in this subpart must meet the general requirements for shipboard equipment listed in this paragraph, which are incorporated by reference.

(1) IMO Resolution A.694(17), "General Requirements for Shipborne Radio Equipment Forming Part of the Global Maritime Distress and Safety System (GMDSS) and for Electronic Navigational Aids," adopted 6 November 1991.

(2) CCITT Recommendation E.161, "Arrangement of Figures, Letters and Symbols on Telephones and Other Devices that Can Be Used for Gaining Access to a Telephone Network," 1989.

(3) CCITT Recommendation Q.11, "Numbering Plan for the International Telephone Service," 1989.

(4) IEC Publication 92-101, "Electrical Installations in Ships," Third Edition 1980 with amendments through 1984.

(5) IEC Publication 533, "Electromagnetic Compatibility of Electrical and Electronic Installations in Ships," First Edition 1977.

(6) IEC Publication 945, "Marine Navigational Equipment," First Edition 1988.

(7) ISO Standard 3791, "Office Machines and Data Processing Equipment - Keyboard Layouts for Numeric Applications," First Edition 1976(E).

(c) The equipment specified in this subpart must also conform to the appropriate performance standards listed below which are incorporated by reference.

(1) *NAVTEX receivers:* (i) IMO Resolution A.525(13), "Performance Standards for Narrow-band Direct Printing Telegraph Equipment for the Reception of Navigational and Meteorological Warnings and Urgent Information to Ships," adopted 17 November 1983.

(ii) CCIR Recommendation 540-2, "Operational and Technical Characteristics for an Automated Direct-printing Telegraph System for Promulgation of Navigational and Meteorological Warnings and Urgent Information to Ships," 1990.

(2) *VHF radio equipment:* (i) IMO Resolution A.609(15), "Performance Standards for Shipborne VHF Radio Installations Capable of Voice Communication and Digital Selective Calling," adopted 19 November 1987.

(ii) CCIR Recommendation 493-4, "Digital Selective-calling System for use in the Maritime Mobile Service," 1990.

(3) *MF radio equipment:* (i) IMO Resolution A.610(15), "Performance Standards for Shipborne MF Radio Installations Capable of Voice Communication and Digital Selective Calling," adopted 19 November 1987.

(ii) CCIR Recommendation 493-4, "Digital Selective-calling System for use in the Maritime Mobile Service," 1990.

(4) *MF/HF radio equipment:* (i) IMO Resolution A.613(15), "Performance Standards for Shipborne MF/HF Radio Installations capable of Voice Communication, Narrow-band Direct Printing and Digital Selective Calling," adopted 19 November 1987.

(ii) CCIR Recommendations 493-4, "Digital Selective-calling System for use in the Maritime Mobile Service," 1990.

(iii) CCIR Recommendation 625-1, "Direct-printing Telegraph Equipment Employing Automatic Identification in the Maritime Mobile Service," 1990. Equipment may conform to CCIR Recommendation 476-4, "Direct-Printing Telegraph Equipment in the Maritime Mobile Service," 1986, in lieu of CCIR Recommendation 625-1, where such equipment was installed on ships prior to February 1, 1993.

(iv) IMO Resolution A.700(17), "Performance Standards for Narrow-band Direct-printing Telegraph Equipment for the Reception of Navigational and Meteorological Warnings and Urgent Information to Ships (MSI) by HF," adopted 6 November 1991.

(5) *406 MHz EPIRBs:* (i) IMO Resolution A.611(15), "Performance Standards for Float-free Satellite Emergency Position-indicating Radio Beacons Operating on 406 MHz," adopted 19 November 1987.

(ii) IMO Resolution A.662(16), "Performance Standards for Float-free Release and Activation Arrangements for Emergency Radio Equipment," adopted 19 October 1989.

(iii) CCIR Recommendation 633-1, "Transmission Characteristics of a Satellite Emergency Position-indicating Radiobeacon (Satellite EPIRB) System Operating Through a Low Polar-orbiting Satellite System in the 406 MHz Band," 1990.

(iv) The 406 MHz EPIRBs must also comply with § 80.1061.

(6) *9 GHz radar transponders:* (i) IMO Resolution A.604(15), "Performance Standards for Survival Craft Radar Transponders for Use in Search and Rescue Operations," adopted 19 November 1987.

(ii) CCIR Recommendation 628-1, "Technical Characteristics for Search and Rescue Radar Transponders," 1990.

(7) *Two-way VHF radiotelephone:* IMO Resolution A.605(15), "Performance Standards for Survival Craft Two-way VHF Radiotelephone Apparatus," adopted 19 November 1987.

(8) *INMARSAT-A SES:* IMO Resolution A.698(17), "Performance Standards for Ship Earth Stations Capable of Two-way Communications," adopted 6 November 1991.

(9) *INMARSAT-C SES:* IMO Resolution A.663(16), "Performance Standards for INMARSAT Standard-C Ship Earth Stations Capable of Transmitting and Receiving Direct-printing Communications," adopted 19 October 1989.

(10) *INMARSAT EGC:* IMO Resolution A.664(16), "Performance Standards for Enhanced Group Call Equipment," adopted 19 October 1989.

(d) The above-referenced documents have been approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Identification data and place to purchase for each of the above-referenced documents are listed as follows:

(1) Copies of IMO Resolutions, the 1974 SOLAS Convention, and the 1983 and 1988 amendments to the 1974 SOLAS Convention can be purchased from Publications, International Maritime Organization, 4 Albert Embankment, London SE1 7SR, United Kingdom.

(i) IMO Resolution A.525(13) is contained in the *Resolutions and Other Decisions of the Assembly of the International Maritime Organization*, 13th Session, 1983, (IMO, London, 1984), Sales Number 073 84.07.E.

(ii) IMO Resolutions A.604(15), A.605(15), A.609(15), A.610(15), A.611(15) and A.613(15) are contained in the *Resolutions and Other Decisions of the Assembly of th e International Maritime Organization*, 15th Session, 1987, (IMO, London, 1988), Sales Number 130 88.03.E.

(iii) IMO Resolutions A.662(16), A.663(16) and A.664(16) are contained in the *Resolutions and Other Decisions of the Assembly of the International Maritime Organization*, 16th Session, 1989, (IMO, London, 1990), Sales Number 136 90.04.E.

(iv) IMO Resolutions A.694(17), A.698(17), and A.700(17) can be ordered from IMO by requesting "A.694, A.698, or A.700(17) from the seventeenth session." IMO Resolutions A.694(17), A.698(17), and A.700(17) will be published in the *Resolutions and Other Decisions of the Assembly of the International Maritime Organization*, 17th Session, 1991.

(2) CCIR Recommendations, ITU Radio Regulations, and CCITT publications can be purchased from the International Telecommunications Union (ITU), Place des Nations, CH-1211 Geneva 20, Switzerland.

(i) All CCIR Recommendations referenced in this Section are contained in *Recommendations of the CCIR, 1990, Volume VIII*, (ITU, Geneva, 1990), 92-61-0424104.

(ii) CCITT Recommendation E.161 is contained in *CCITT Volume II - Telephone and Network ISDN-Operation, Numbering, Routing and Mobile Service*, (ITU, Geneva, 1989), ISBN 92-61-03261-3.

(iii) CCITT Recommendation Q.11 is contained in *CCITT Blue Book Volume VI, General Recommendation on Telephone Switching and Signalling*, (ITU, Geneva, 1989), ISBN 92-61-03451-9.

(3) IEC Publications can be purchased from the International Electrotechnical Commission, 3 Rue de Varembe, CH-1211 Geneva 20, Switzerland, or from the American National Standards Institute (ANSI), 11 West 42nd Street, New York, NY 10036, telephone (212) 642-4900.

(4) ISO Standards can be purchased from the International Organization for Standardization, 1 Rue de Varembe, CH-1211 Geneva 20, Switzerland, or from the American National Standards Institute (ANSI), 11 West 42nd Street, New York, NY 10036, telephone (212) 642-4900.

(5) Copies of the publications listed in this Section that are incorporated by reference may be inspected at the Federal Communications Commission, 1919 M Street, N.W., Dockets Branch (Room 239), Washington, D.C. or at the Office of the Federal Register, 800 North Capital Street, N.W., Suite 700, Washington, D.C.

3. Section 80.1103 is amended by revising paragraphs (a) and (e) to read as follows:

§ 80.1103 Equipment authorization

(a) All equipment specified § 80.1101 must be type accepted in accordance with 47 C.F.R. Part 2 specifically for GMDSS use, except for equipment used in the INMARSAT space segment which must be type-approved by INMARSAT and notified in accordance with 47 C.F.R. Part 2 specifically for GMDSS use. The technical parameters of the equipment must conform to the performance standards as specified in § 80.1101. For emergency position-indicating radiobeacons operating on 406 MHz (406 MHz EPIRBs) that were authorized prior to April 15, 1992, and meet the requirements of § 80.1101, the manufacturer may attest by letter that the equipment (indicate FCC ID#) meets the requirements of § 80.1101 and request that it be denoted as approved for GMDSS use.

* * * * *

(e) In addition to the requirements in Part 2 of this chapter, equipment specified in § 80.1101 shall be labelled as follows: "This device complies with the GMDSS provisions of Part 80 of the FCC Rules." Such a label is not required for emergency position-indicating radiobeacons operating on 406 MHz (406 MHz EPIRBs) that were authorized prior to April 15, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-550

In the Matter of

Amendment of Section 73.202(b), RM-7345
Table of Allotments,
FM Broadcast Stations.
(Lafayette, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 25, 1992; Released: September 23, 1992

By the Chief, Allocations Branch:

1. At the request of Lafayette FM Joint Venture ("petitioner"), permittee of Station KRRQ(FM), Channel 238A, Lafayette, Louisiana, the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6954 (1990), proposing the substitution of Channel 238C2 for Channel 238A at Lafayette, and modification of Station KRRQ(FM)'s construction permit to specify operation on the higher class channel. Petitioner timely filed comments in support.[1]

2. We believe the public interest would be served by allotting Channel 238C2 at Lafayette because it would enable Station KRRQ(FM) to provide an expanded coverage area FM service to the community. Channel 238C2 can be allotted at petitioner's specified site 24.1 kilometers (15.0 miles) northwest of the community.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 9, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Lafayette, Louisiana	238C2

4. IT IS FURTHER ORDERED, That, pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Lafayette FM Joint Venture for Station KRRQ(FM), Channel 238A, IS MODIFIED to specify operation on Channel 238C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission an application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, that the Secretary shall send a copy of this *Report and Order* by Certified Mail to the following:

Charles L. Spencer
Herbert & Spencer
Old Warden's House
701 Laurel Street
Baton Rouge, Louisiana 70802

C.R. Crisler
P.O. Box 41971
Memphis, Tennessee 38174

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] C. R. Crisler ("Crisler"), a dismissed applicant for the allotment of Channel 238A at Lafayette, filed opposing comments referencing several other Commission and Court of Appeals cases which, he argues, prevent any action in this case. We will not address Crisler's opposition. Several of the matters he cites have been resolved. To the extent any of these matters remains open, they do not prevent our action in this case. Furthermore, Crisler does not argue that the upgrade in the instant case is technically deficient pursuant to the Commission's Rules. Accordingly, we see no reason to withold our action in this matter.

[2] The reference coordinates of petitioner's specified site for Channel 238C2 at Lafayette are North Latitude 30-21-44 and West Longitude 92-12-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

CORRECTED

MM Docket No. 89-543

In re Applications of

ESTEBAN DON LIZARDO & MATT FRANICH d/b/a LIZARDO-FRANICH PARTNERSHIP	File No. BPH-871109MF
SUSAN MARSZAL	File No. BPH-871110ME
MEDIA WEST BROADCAST GROUP, INC.	File No. BPH-871110MF
OLD TOWN BROADCASTING CORPORATION	File No. BPH-871110MI
RIO AMERICANO COMMUNICATIONS CORP.	File No. BPH-871110MM
ONE-O-THREE BROADCASTING, CO. INC.	File No. BPH-871110MT
OLYMPIC BROADCASTERS, INC.	File No. BPH-871110MY
FAHLDA BROADCASTING COMPANY, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-871110NB
OLD SACRAMENTO BROADCASTING CO., INC.	File No. BPH-871110NJ
JAM FM LIMITED PARTNERSHIP	File No. BPH-871110NL
JACK L. POWELL	File No. BPH-871110NM
SACRAMENTO FM BROADCASTING LIMITED PARTNERSHIP	File No. BPH-871110NQ
GEORGE K. FUNG	File No. BPH-871110NU

For Construction Permit
for a New FM Station on
Channel 278A in
Sacramento, California

MEMORANDUM OPINION AND ORDER

Adopted: September 2, 1992; Released: September 23, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.

1. The Board has before it the *Initial Decision*, 7 FCC Rcd 1678 (1992) (*I.D.*), of Administrative Law Judge Edward Luton (ALJ) in the above-captioned proceeding. It also has before it the exceptions and responsive pleadings of the remaining parties.[1] Oral Argument before the Board was heard on August 21, 1992. For the reasons set forth below, we must certify to the Commission novel questions of law and policy arising out of the Commission's *Second Report and Order* (MM Dkt. No. 84-231), 101 FCC 2d 638 (1985) (*Second Report*). The questions we certify relate to the "Daytimer preference" facet of that *Second Report*,[2] and are most likely, in the Board's view, to be of ultimate decisional significance in this proceeding.

DAYTIMER PREFERENCE

2. More specifically, the *I.D.* awarded this frequency to Fahlda Broadcasting Co. He also ranked JAM FM Limited Partnership second and Jack L. Powell third. *I.D.*, para. 198. Putting aside for the moment other assorted exceptions, the exceptions heavily attack the ALJ's award of ownership/management integration credit to Jack L. Powell. Powell, an individual applicant who proposes full-time management of this new FM facility, is now the licensee of Sacramento's KJAY-AM, a daytime-only facility he has operated since 1965 but which he pledges to divest within three years of the commencement of program test authority for this new FM facility, should he here "be successful. *I.D.*, para. 126.[3] The ALJ awarded Powell a 100% quantitative ownership/management integration credit, *id.*, para. 193, a "substantial" preference as well for

[1] Twenty-four applicants originally filed for this facility. The Board's records reflect that five unsuccessful applicants captioned in the *I.D.* filed no exceptions, thus leaving eight mutually exclusive contenders. The applications of (1) Estaban Don Lizardo & Matt Franich d/b/a Lizardo-Franich Partnership, (2) Susan Marszal, (3) Old Town Broadcasting Corp., (4) One-O-Three Broadcasting Co., Inc., and (5) Sacramento FM Broadcasters Limited Partnership will be dismissed for failure to prosecute. 47 CFR § 1.276(f).

[2] The Daytimer preference facet of the *Second Report* was affirmed in *National Black Media Coalition v. FCC*, 822 F.2d 277 (2d Cir. 1987), and provides that under certain circumstances a daytime-only licensee in the same community may receive, when applying for an FM station, a comparative preference equal to that of local residence or minority ownership. *Second Report* at 643-47 & n.12.

[3] This AM divestiture pledge comports with one of the requirements for the award of a comparative Daytimer preference. *Second Report* at 646-47. Powell also claims to meet the other stated requirements for the preference; *e.g.*, he has owned and managed KJAY-AM since 1965 and he proposes full-time management of this FM facility. *See id.*, at 646.

his "long-time local residence and extensive local civic participation," *id.*, at para. 197, and critically (*id.*, at para. 194):

> a "daytimer preference" upgrading the value of his broadcast experience to a level equivalent to the value of minority group membership...

3. The exceptions before us object in various ways to the ALJ's reckoning of Powell's comparative credit and raise the questions that vex the Board. First and foremost, several exceptors contend that Powell should receive little or no "integration" credit because, although he has proposed to integrate full-time into the management of the new FM station, *see Second Report* at 646 & n.14, Powell has candidly indicated that he will also remain the General Manager of KJAY-AM, pending its eventual divestiture.[4] Moreover, Powell's only "plan" for accommodating his proposed full-time FM integration with his stated intention to remain the General Manager of his (co-located) AM station is to lessen, by an unspecified number of hours, the time he now spends managing the AM station, to work a longer work week if required, and to rely more heavily on the AM station's only full-time employee. Citing the line of cases that require for integration credit a very specific, credible plan for accommodating other business interests on which appreciable time is now (and might in the future be) spent,[5] the exceptors contend that Powell should not receive full-time integration credit in view of his "conflicting" intention to continue as General Manager of the AM station for up to three years, pending that station's divestiture.

4. While several of the exceptors do not appear to object, *per se*, to the Daytimer preference awarded to Powell by the ALJ,[6] the *Second Report* requires that "[t]he applicant also must propose to be integrated in the operation of the FM station," 101 FCC 2d at 646, and it goes on to note (*id.*, at n.14):

> As is the case with all current integration enhancement credits, the extent to which an applicant must be integrated before receiving upgraded broadcast experience credit will be determined by existing integration standards as enunciated in the *Comparative Policy Statement*, 1 FCC 2d at 395-396, and pertinent cases subsequent thereto.

5. The first impression situation before us raises a question not expressly addressed in the *Second Report* and the answer may well determine the outcome of this case. That is, given the Board's view that Powell's "plan" for reducing his management oversight of his AM station is, under conventional case precedent, too unspecific to otherwise credit his full-time FM integration proposal, the Board nonetheless remains uncertain whether the AM station should be considered no differently from any other outside business interest that an applicant proposes to retain concurrently.

6. On the one hand, it is obvious that the *raison d' etre* for the Daytimer preference is the fact that this "unique class of broadcasters" suffered under a commercial disadvantage *vis a vis* licensees with unrestricted hours of operation. Such broadcasters also suffered from a nearly insurmountable "diversification" disadvantage in any competition for a new FM frequency made available in that same community. The Commission therefore reasoned that many of these broadcasters had labored many years to learn and service the needs of the subject community, *see Second Report* at 643-44, and the court reiterated that, without a Daytimer preference, our "existing comparative criteria could entitle competing applicants for such FM facilities to a diversification preference over daytime-only licensees, thus potentially foreclosing a means by which these experienced broadcasters could *expand* their service to the public." *National Black Media Coalition v. FCC*, *supra note* 2, 822 F.2d at 279 (emphasis added)(internal citation omitted). Hence, there is no question that the Commission intended to make daytime-only broadcasters a special class for comparative FM licensing purposes, so as to *"expand"* their service to the local community. While it is equally clear that a daytimer applicant, in addition to pledging to divest the AM station within three years, must pledge a personal management position at the new FM, it is not evident that the applicant must likewise pledge to substantially relinquish a concurrent AM management position, pending divestiture. As the court observed about Daytimer preference:

> In short, this incentive will encourage broadcasters who bear a difficult burden, such as the daytime-only restriction borne by daytimers, *to provide excellent service* in the hope that the Commission will reward them in the future. We cannot characterize this reasoning as irrational.

Id., at 281 (emphasis added). The Board tentatively believes that a relinquishment demand could be inconsistent with the "rational" intent of the *Second Report* in that it would require a reduction of personal oversight of the daytime-only AM station.

7. On the other hand, footnote 14 of the *Second Report* enjoins that integration credit is to be awarded in a manner consistent with comparative case precedent, which precedent ordinarily demands a *specific* and *credible* plan for accommodating "other" ongoing business interests, including broadcast interests, in the general line of comparative cases. *See supra* note 5 (and illustrative cases cited therein). Consequently, it can be inferred that no integra-

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[4] *See, e.g.*, Fahlda Exceptions at 14-15; Media West Exceptions at 14-16; Fung Exceptions at 16-20; Old Sacramento Exceptions at 14-18. Powell is also the AM station's General Sales Manager and Program Director. *Id.*, at 17.

[5] *See, e.g., Naguabo Broadcasting Co.*, 6 FCC Rcd 4879, 4880 (1991)(subsequent history omitted). The requirement for a specific and credible plan for dealing with other significant business interests has been applied to other broadcast interests and occupations as well. *See generally Julia S. Zozaya*, 5 FCC Rcd 6607, 6607-08 (1990) (subsequent history omitted); *Cuban-American Limited*, 5 FCC Rcd 3781, 3784-85 (1990)(subsequent history omitted). Without commenting as to whether Powell's plan is here "credible," we must agree with the exceptors that his plan is not "specific" within the guidelines of prior precedent. *See, e.g., Naguabo Broadcasting; Leininger-Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987)(subsequent history omitted); *Ft. Collins Telecasters*, 103 FCC 2d 978,985-96 (Rev. Bd. 1986)(subsequent history omitted).

[6] *See supra* note 4, and the objections contained in those pleadings.

tion credit for the FM station can be awarded where the daytimer applicant will largely continue his personal management function at the AM station, even if the two stations are to be co-located. Because, as the *Second Report* observes, integration credit is a vital comparative factor, 101 FCC 2d at 645, further clarification of the *Second Report* is necessary in deciding this instant case.

8. Clarification would also be helpful on a second question, which also might likely have a decisional impact in this proceeding. The *Second Report* declares that, from the standpoint of the extant comparative criteria, the effect of the Daytimer preference is to "upgrade the value of *broadcast experience* as an integration enhancement so that it will be equal to the enhancement value of local residence or minority ownership." *Id.* (emphasis added).[7] However, as exemplified by the case at bar, and were Powell to be entitled to full-time integration credit, it is not clear who would prevail under the weighting scheme of the *Second Report*. While Powell boasts a better record on local residence and civic activities, his Daytimer preference (if so entitled)would be offset by the minority ownership of several of his competitors, *e.g.*, Fahlda, JAM and Old Sacramento. Under the ALJ's reckoning, however, Fahlda and JAM were ranked above Powell, reductively and perhaps ironically, for their "broadcast experience," *see I.D.*, paras. 194-197 (both awarded "slight" preferences for "broadcast experience"; Powell awarded none beyond minority offset), even though those applicants have a bare fraction of Powell's quarter-century experience. *See id.*, paras. 77 (Fahlda);[8] 123-124 (JAM). It would be exceedingly useful to have the Commission's view on whether, in calculating under the "best practicable service" criterion, greater relative weight may be afforded to that applicant shown to have the strongest overall credentials, rather than weighting separately and absolutely discretely (1) integration, (2) a minority enhancement, (3) local residence/civic activities, and (4) broadcast experience.[9]

9. ACCORDINGLY, pursuant to 47 CFR § 0.363(b), we hereby certify to the Commission for comment the following novel questions of law and policy:

> (1) Whether it is mandatory, for the award of an AM Daytimer preference (and/or ownership/management integration credit), that the subject applicant pledge to substantially relinquish a significant management position at the AM station, pending divestiture; and
>
> (2) Whether, in calculating the comparative preferences in cases involving an AM daytimer, the Board must treat separately and absolutely discretely the sub-elements of "best practicable service" or whether it may consider the strongest record overall in awarding a dispositive preference for "best practicable service."

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

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[7] Ordinarily, broadcast experience is "not so significant as local residence." *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965).

[8] Fahlda was also awarded a "moderate" preference for female ownership. We disregard this factor. *Frank Digesu, Sr.*, FCC 92-373, released August 25, 1992 at para. 4 & n.1.

[9] The *Second Report* had noted:

> Equal weight is given to local residence and minority ownership. Past participation in civic affairs and broadcast experience are accorded less weight than either local residence or minority ownership. *See Radio Jonesboro, Inc.*, FCC 95305 [sic].

101 FCC 2d at 645 n.12. However, in the recent *Ronald Sorenson*, 6 FCC Rcd 1952, 1952-53 & n.5 (1991), the Commission distinguished *Radio Jonesboro* and held that "[t]he Board erred in treating local residence and civic activities as separate enhancement factors...."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Telocator Science and Education
Foundation's LifePage program

ORDER

Adopted: September 9, 1992; Released: September 24, 1992

By the Commission:

1. Before the Commission is a request for clarification by Telocator, a trade association of mobile radio licensees including cellular carriers, two-way and paging radio common carriers and private carrier paging (PCP) systems. Telocator requests that the Commission confirm that participation in the Telocator LifePage program by PCP entities is permissible under Commission rules.

2. Under the LifePage program, which originated in 1983 in California, patients who are active candidates for organ transplants receive pagers, usually free of charge, from designated Telocator members. Patients who are heart, liver, kidney, pancreas, or lung transplant candidates are currently eligible for participation in the program. The pagers are used to alert them when suitable organs become available for transplant. Time is of the essence, for if the prospective organ recipient cannot be in surgery within hours after an organ has been located, the organ goes to the next patient on the waiting list. The LifePage pager allows patients to remain in contact with their hospitals without sitting at home "chained to their telephone," as Telocator puts it. The LifePage program now has participating carriers in all 50 states and Puerto Rico with companion programs in the United Kingdom and Canada. The program has provided pagers to over 12,000 individuals across the United States, and is administered by the Telocator Science and Education Foundation.

3. In its letter, Telocator sought clarification as to whether participation in the LifePage program by PCP entities would be permitted under the Commission's Rules. Under Section 90.494 of the Commission's Rules, 47 C.F.R. § 90.494, certain 900 MHz frequencies are available for the provision of paging service to representatives of Federal Government agencies and persons eligible for licensing under subparts B, C, D or E of Part 90. In the Business Radio Service, certain 150 MHz and 460 MHz frequencies are similarly available to provide paging service to the same classes of eligibles. *See* Sections 90.75 (b) and (c)(10) of the Rules, 47 C.F.R. §§ 90.75(b) and (c)(10). Section 90.38 of Subpart C, Special Emergency Radio Service, 47 C.F.R. § 90.38, specifically renders certain limited classes of physically handicapped persons (e.g., visually impaired, nonambulatory, hearing deficient) eligible to receive private paging service.

4. Although persons participating in the LifePage program may well be eligible to receive paging service under the eligibility parameters of Section 90.38, it is possible that others may not fall within the enumerated categories of that rule even though they are substantially handicapped by a failing or failed vital organ. Potential transplant recipients require swift, sure radio communications if they are to benefit from a lifesaving organ transplant without having to remain constantly near their telephones. It is clear that only radio can serve this need and that potential transplant recipients require the use of radio at least as much as, if not more than, other classes of eligibles in Section 90.38. Accordingly, we have decided to amend Section 90.38 to make prospective organ transplant recipients eligible under that section. This will ensure that programs such as LifePage, which are clearly in the public interest, may operate free of uncertainty caused by possible regulatory restrictions on eligibility. Potential transplant recipients will thus be able to receive paging service from private radio systems. *See* 47 C.F.R. § 90.494(a), n.1.

5. Because this rule change is noncontroversial and because it is so clearly in the public interest, we find good cause to conclude that notice and comment are impracticable, unnecessary, and contrary to the public interest. *See* 5 U.S.C. § 553(b)(B).

6. Accordingly, IT IS ORDERED that, effective 30 days after publication in the Federal Register, Section 90.38(a) of the Commission's Rules, 47 C.F.R. § 90.38(a) IS AMENDED in accordance with Appendix A hereto.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The Authority Citation for Part 90 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. Section 90.38 is amended by revising paragraph (a)(4), and by adding a new paragraph (a)(5) and to read as follows:

* * * * *

(4) Any person actively awaiting an organ transplant.

(5) Parents or guardians of persons under 18 years eligible under (1), (2), (3), or (4), or institutions devoted to the care or training of those persons.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 15, 1992

Released: September 24, 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Graham Satherlie 8310-FC
Great Scott Broadcasting C12-454
Licensee, Radio Station WMBO C3-153
1340 Corporation Drive
Auburn, NY 13021

Dear Mr. Satherlie:

This letter constitutes a NOTICE OF APPARENT LIABILITY for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On November 19, 1991, the Commission received a complaint alleging that after noon each day, WMBO broadcasts only taped news reports, but previews the newscasts as if they were being presented live. The complainant stated that teasers are aired five minutes prior to the news stating, "Here's the stories we're working on for the top of the hour," even though the newscasts had been taped earlier. The complainant also alleged that often there are gaps in programming because, at some times, no one is present at the facility to operate the station.

Based on this complaint, the Commission sent you a letter of inquiry on March 12, 1992, asking for your comments concerning the complainant's allegations. In your response dated March 17, 1992, you admit airing the subject news previews and state that, notwithstanding those previews, the newscasts broadcast are on tape. You state it was never your intention to deceive the public and that you have changed the wording of your news teasers. You also admit that the station has several staff members who operate WMBO's facility but that these individuals are not licensed. You indicate that these individuals were given an appropriate license application form and were instructed to send their forms to the Commission while posting their perforated portions until they received their licenses. You state that several staff members had only temporary cards to operate the station's facility but that their cards had expired without their having received their official operator's licenses from the Commission. You state that after receiving the Commission's letter you made inquiries to your staff members about this matter and you discovered that several individuals had either neglected to send in their forms or to pay the required fees for their licenses. You assert that the individuals who were involved in this matter have now sent in their forms with the required fees. Accordingly, you admit that these individuals were unlicensed.

Based on the foregoing, and by your own admission, Radio Station WMBO has violated Section 73.1208(a) of the Commission's Rules by making an affirmative attempt to make taped newscasts appear as if they were being presented live. WMBO also violated Section 73.1860(a) of the Rules by operating at times[1] without a licensed operator on duty. These violations apparently began at some time prior to November 19, 1991, and continued at least until you received our March 12, 1992, letter of inquiry.

Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Great Scott Broadcasting, licensee of Radio Station WMBO, Auburn, NY, is hereby advised of its Apparent Liability for a Forfeiture in the amount of $5,000 for its apparent willful and repeated violations of Sections 73.1208(a) and 73.1860(a) of the Commission's Rules. The amount of the forfeiture was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act and in our recently adopted *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied* FCC 92-212 (released June 4, 1992). Under these standards, $1,250 is the base forfeiture amount for violations of Sections 73.1208(a) and 73.1860(a) of the Commission's Rules. Because these violations were repeated, the forfeiture amount was increased to $5,000.

In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTE

[1] The station was apparently operated without a licensed operator during many time periods including: Sundays until noon and after 7:00 p.m.; Mondays, Tuesdays and Fridays after 7:00 p.m.; Saturdays until 6:00 p.m.; and Mondays through Fridays from at least 1:00 a.m. until 6:00 a.m

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: September 24, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Hualapai Broadcasters, Inc.	8210-BH
Licensee, Station KRCY	C3-382
2156 Lackland	C7-542
Overland, Missouri 63114	

Dear Sir or Madam:

This letter constitutes a Notice of Apparent Liability for a forfeiture in the amount of twelve thousand, five hundred dollars ($12,500) pursuant to Section 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and the Commission's Rules. This action is being taken by the Chief of the Mass Media Bureau pursuant to the delegation of authority in Section 0.283 of the Commission's Rules.

On May 21, 1991, the Commission sent you a letter of inquiry, which sought to determine if Station KRCY violated the anti-lottery provisions by broadcasting a commercial for a slot machine tournament to be held at the Edgewater Hotel Casino from March 21 to March 23, 1991. Information provided to the Commission indicated that such a commercial was broadcast about ten times a day on KRCY.

In your July 10, 1991, response you state that KRCY broadcast the subject commercial a total of eight times from March 5 to March 6, 1991. You state that on March 6, 1991, you were informed that the subject commercial might violate the Commission's anti-lottery provisions and that you immediately "pulled" the commercial and replaced it with another. This assertion is supported by a statement from KRCY's Traffic Director.

You state that prior to airing the commercial for the slot tournament, your personnel had questioned its legality, but had been assured by the advertising manager for the Edgewater Hotel and Casino that it was in compliance with Commission regulations. The advertising manager apparently relied on information she had received at an "Advertising and the Law" seminar hosted by Radio Station KRVX.

Contrary to this advice, the slot tournament that you promoted contained the elements of chance, prize and consideration and was, accordingly, a lottery. Commission staff has previously ruled that where a *poker* tournament involves a closed-ended arrangement in which all players start with an equal amount of money and play in a "winner-take-all" elimination contest, without limit as to time, the contest is a game of skill. Since chance is such an inherent part of playing slot machines, the same criteria would not remove the element of chance from a slot tournament.

Your reliance on inaccurate information concerning the legality of promoting this lottery does not absolve you of responsibility for broadcasting the advertisement in question. In view of the foregoing, it appears that Station KRCY, Kingman, Arizona, violated 18 U.S.C. Section 1304 and Section 73.1211 of the Commission's Rules on March 5 and March 6, 1991. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Hualapai Broadcasters, Inc. is hereby advised of its apparent liability for a forfeiture of twelve thousand, five hundred dollars ($12,500).

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, FCC 92-212 (released June 4, 1992). Under these standards, $6,250 is the base forfeiture for a lottery violation. Because the violation was repeated, the forfeiture amount is increased and the total forfeiture amount is twelve thousand, five hundred dollars ($12,500).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 4, 1992

Released: September 24, 1992

CERTIFIED MAIL NO. P 897 383 283
RETURN RECEIPT REQUESTED

Barry D. Wood, Esq.
Jones, Waldo, Holbrook
& McDonough
Suite 900
2300 M Street, N.W.
Washington, D.C. 20037

Re: Notice of Forfeiture
issued to Quality
Broadcasting Corp.,
licensee of KWVS
on February 25, 1992.
43153462-92004

Dear Mr. Wood:

This is in response to your letters to the Federal Communications Commission (FCC) dated February 28 and April 20, 1992. Your letters indicated that you wished to "appeal" a $4,750 monetary forfeiture penalty that the FCC's Kingsville Office had assessed against Quality Broadcasting Corp. (Quality), for violating the FCC's rules in its operation of broadcast station KWVS (FM) in Kingsville, Texas.

We are treating your requests as a Petition for Reconsideration under Section 1.106 of the FCC's rules, 47 C.F.R. Section 1.106. As explained below, we are reducing the $4,750 monetary forfeiture penalty to $3,000, and we are affirming this reduced penalty.

Our records show that on December 12, 1991, an FCC engineer inspected radio station KWVS (FM). During his review of KWVS's local public inspection file, which was located at the Kingsville Police Department, he could not find recent ownership reports, lists of programs that addressed significant community issues during 1990 and 1991, and statements certifying compliance with the public notice requirements relating to the filing of applications for renewal of KWVS's license. The FCC inspector also observed that an FCC licensed transmitter operator was not on duty at KWVS.

On December 16, 1991, the FCC's Kingsville Office issued Quality an Official Notice of Violation. Quality responded on January 16, 1992. On January 21, 1992, the FCC's Kingsville Office sent Quality a Notice of Apparent Liability for willfully violating Sections 73.3526(a) and 73.1860(a) of the FCC's rules, 47 C.F.R. Section 73.3526(a) (requires FM stations to maintain certain records in a file available for public inspection) and 73.1860(a) (requires a person holding an FCC operator license to be on duty in charge of the transmitter while broadcasting). The Notice requested Quality to respond within 30 days. Quality did not reply during the 30 days, and on February 25, 1992, the FCC's Kingsville Office issued Quality a Notice of Forfeiture for a $4,750 monetary forfeiture penalty. This included a $3,500 penalty for violating Section 73.3526(a), and a $1,250 penalty for the Section 73.1860(a) violation. Quality sent to the FCC a reply dated February 21, 1992, which was received by facsimile on February 28 and by mail on March 9, 1992. The FCC's Kingsville Office responded on March 17, 1992, and affirmed the $4,750 monetary forfeiture penalty. The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act of 1934, 47 U.S.C. Section 503(b).

This $4,750 monetary forfeiture penalty is reduced to $3,000. The FCC's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695, 69 RR2d 823 (1991), *modified in part on reconsideration*, FCC 92-212 (May 14, 1992) (hereinafter cited as *Policy Statement*), specifies certain factors that the FCC may consider as "downward adjustment criteria" to reduce monetary forfeiture penalties. Taking these factors into consideration, especially lack of evidence concerning past noncompliance with the FCC's rules, the penalty is reduced to $3,000.

Quality in its correspondence to the FCC states a number of reasons why it should not be liable for a monetary forfeiture penalty. Quality claims that its 1990 ownership report was in the public inspection file. It indicates that the ownership report was overlooked by the FCC inspector because it was attached to its license renewal application since the two documents were filed simultaneously. In a footnote, Quality appears to admit that an ownership report for 1991 was not in the public inspection file. Quality states:

> The station's ownership has not changed subsequent to the 1990 filing. Therefore, only a certification to that effect was filed in 1991. A copy of that certification has been placed in the public inspection files in Kingsville ....

Section 73.3615(a) of the FCC's rules requires that an ownership report or a certification that there has been no change in ownership be filed once a year. 47 C.F.R. Section 73.3615(a). Furthermore, a copy of ownership reports and "related material filed pursuant to this section" are required to be kept in the public inspection file. 47 C.F.R. Section 73.3615(g). The FCC inspector reviewed KWVS's public inspection file by going through it twice, page by page. He did not find ownership reports, or a certification that there had been no change in ownership, for 1990 and 1991. Quality seems to admit that the certification for 1991 was not in the file. Therefore, the charge that ownership reports were missing from the public inspection file is affirmed.

Quality presents several arguments regarding why it should not be cited for failure to have lists of programs that addressed significant community issues during 1990 and 1991 in its public inspection file. Quality claims that the lists for 1990 were in the file. However, as previously explained, the FCC inspector carefully reviewed the file and failed to find these lists.

Quality admits that the lists for the first three quarters of 1991 were not in the public inspection file in Kingsville, but argues that this was not a serious violation since no member of the public had requested to review this file or was denied access. Section 73.3526(a) of the FCC's rules requires programs-issues lists to be in a local public inspection file. 47 C.F.R. Section 73.3526(a). If these lists are missing, the rule is violated and forfeiture penalties may be imposed. The Commission has stated that "We expect full compliance with our rules" regarding the maintenace of the public inspection file. *Amherst Broadcasting, Inc.*, 46 RR2d 497, 499 (1979) (Decision concerned a petition to deny a renewal application, which was dismissed, and not a forfeiture). *See also Office of Communication of United Church v. FCC*, 779 F.2d 702 (D.C. Cir. 1985) (The court, in general, indicated the importance of programs-issues lists, and the necessity for adequate information.)

There is, moreover, no indication in Section 73.3526(a) of the FCC's rules that the public must seek access to the public inspection file or be denied access before the rule is violated because of an incomplete file. Section 73.1226 of the FCC's rules requires station records and logs to "be made available to any authorized representative of the FCC upon request." 47 C.F.R. Section 73.1226. *See also* 47 C.F.R. Section 73.1225. The public inspection file in general and its contents, including programs-issues lists, are considered "records." *E.g.*, 47 C.F.R. Sections 73.3526(a), (d) and (e). Thus, the FCC is entitled to inspect the public inspection file, and if the file fails to comply with Section 73.3526(a) during this inspection, a violation of the rule occurs. If a station refuses to allow the public to inspect a public inspection file, a different rule is violated, namely, Section 73.3526(d). 47 C.F.R. Section 73.3526(d).

It is further argued that a violation did not occur because the programs-issues list were made available to the FCC inspector when he visited KWVS's studio in Corpus Christi. These lists, however, did not include the third quarter of 1991. Also, the FCC requires that the public inspection file be located in the community where a station is licensed, in this case Kingsville, unless a licensee had obtained a waiver before 1987. 47 C.F.R. Section 73.3526(d): *Main Studio and Program Organization Rules*, 62 RR2d 1582, 1589 (1987), *modified, in part*, 65 RR2d 120, 121-23 (1988). There is no indication that KWVS had a waiver.

Next, Quality argues that there are no "reported cases ... where the full Commission sustained a forfeiture of any amount where only a few programs/issues lists were missing from a public file ...." Monetary forfeiture penalties have been imposed when only several required reports were missing from a public inspection file, it argues. *Dontron, Inc.*, 69 RR2d 326, 328 (Mass Media Bureau, 1991). The fact that some of the programs-issues lists were missing rather than all the lists was taken into consideration by the FCC's Kingsville Office in its Notice of Apparent Liability. This Notice reduced the proposed penalty because "the violation of the public file requirement is at the low level of seriousness within the violation category."

Quality cites *WPOM Radio Partners, Ltd.*, 68 RR2d 1536 (Mass Media Bureau, 1991) as a case in which the FCC declined to impose a forfeiture for a partially incomplete public inspection file. Although it is difficult to determine the exact factors that influenced the Bureau's decision, the decision noted that an FCC inspection of the station found no violations involving the public inspection file, and evidence of a failure to maintain the file consisted of complaints by former employees and a statement by the station "that it cannot determine whether documents were placed in the file on a timely basis." It appears that the Bureau may have believed that it did not have sufficient evidence to issue a monetary forfeiture penalty for a failure to properly maintain the public inspection file.

It is also argued that the monetary forfeiture penalty is too high for the public file violations because other FCC decisions only imposed a $300 monetary forfeiture penalty, and *Vernon Broadcasting, Inc.*, 60 RR2d 1275 (1986) and *Dontron, Inc.*, 69 RR2d 326 (Mass Media Bureau, adopted April 30, 1991) were cited. However, both of these cases were decided under old guidelines for assessing forfeitures. On August 1, 1991, the FCC substantially increased the value of its monetary forfeiture penalties when it issued its *Policy Statement* on forfeitures. The monetary forfeiture penalty imposed on Quality was issued after the *Policy Statement* and complies with its guidance.

Regarding the public inspection file violation for failure to have statements certifying compliance with the public notice requirements relating to the filing of license renewal applications, Quality admits this violation, but states that it was "not aware of that requirement." However, a licensee's "oversight or failure to acquaint itself with the Commission's requirements will not excuse a licensee from its obligation to operate its station in compliance with the ... Commission's Rules." *Triad Broadcasting Company, Inc.*, 96 FCC 2d 1235, 1242 (1984). The purpose of forfeiture proceedings is "to impel broadcast licensees to become familiar with the ... applicable rules, and to adopt procedures ... which will insure that stations will be operated in substantial compliance with ... the Commission's Rules." *Crowell-Collier Broadcasting Corp.*, 44 FCC 2444, 2449-50 (1961).

Quality argues that "I thought that since the KWVS program logs reflect the broadcast of the required public notice, that would be sufficient." The FCC, however, rejected this argument when it imposed a forfeiture in *Vernon Broadcasting, Inc.*, 60 RR 2d 1275 (1986). Quality further argues that "The important thing is that the required renewal announcements were aired on the station as required" and "what possible importance can attach to the presence of the statements of compliance in ... the public file long after the license renewal application has been granted." The requirement that a station announce that it is filing an application for renewal is in Section 73.3580 of the FCC's rules. 47 C.F.R. Section 73.3580. If it failed to make the announcements, this rule would be violated. The public inspection file rule, Section 73.3526, is a different rule. 47 C.F.R. Section 73.3526. This rule requires that information regarding license renewal announcements be filed in the public inspection file. Failure to do this results in a violation of the rule. If Quality has concerns regarding the usefulness of this information, it should petition the FCC to delete this requirement from the public inspection file rule.

Several reasons are also presented by Quality regarding why it should not be subject to a penalty for failure to have a licensed operator on duty. First, Quality argues that "since the operator at the station had applied for his operator's license months earlier, there is no reason (other than a glitch in the FCC's own processes) that he did not already have at least a provisional license." The FCC keeps records of license applications and copies of checks sub-

mitted with applications. There is no record that the operator in question applied for a license during the period indicated by Quality.

Secondly, Quality states that a licensed operator was at the station 20 feet from the unlicensed operator, and two other licensed operators were temporarily away from the station, but were in contact with the station and immediately accessible if needed. Section 73.1860(a) of the FCC's rules requires that a licensed operator be "on duty in charge of the transmitter ...." 47 C.F.R. Section 73.1860(a). Station records indicated that the unlicensed operator was the person in charge of the transmitter. *See* 47 C.F.R. Section 73.1820(a). Thus, Section 73.1860(a) was violated. The *Policy Statement* authorizes a monetary forfeiture penalty of $1,250 for miscellaneous violations, and this was the amount assessed by the FCC's Kingsville Office. The possibility that a licensed operator may have been nearby or immediately available does not satisfy the requirements of Section 73.1860 of the FCC's rules. For example, Section 73.1860(b) provides that "The transmitter operator must be able to observe the required transmitter and monitor metering to determine deviations from normal indications. The operator must also be able to make the necessary adjustments from the normal operator duty position ...." 47 C.F.R. Section 73.1860(b).

Quality further argues that it immediately corrected the deficiencies. However, remedial action to correct a violation, although commendable, does not nullify a forfeiture penalty. *E.g., Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973); *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966).

Quality also claims that the violations were not willful as alleged in the FCC's Notice of Apparent Liability, "but only represent isolated lapses which we are endeavoring to correct." There was a willful violation because the "omission of required forms ... implies the type of indifference to Commission Rules that justifies the imposition of forfeitures .... [C]lerical errors in failing to file required forms" are subject to forfeiture penalties. *Standard Communications Corporation*, 1 FCC Rcd 358 (1986). One of the main policy factors guiding the FCC in imposing forfeitures has been whether a rule violation demonstrated a lack of concern, indifference or laxity regarding compliance with the FCC's rules. *Midwest Radio-Television, Inc.*, 45 FCC 1137, 1141-42 (1963).

Finally, Quality claims that it does not have the ability to pay the monetary forfeiture penalty, and provides unaudited financial information dated December 31, 1991, to support its claim. The Communications Act of 1934 directs the FCC to consider ability to pay when imposing forfeitures. 47 U.S.C. Section 503(b)(2). If there is a serious problem in paying the monetary forfeiture penalty, the FCC needs reliable and verifiable supporting documentation. This documentation usually takes the form of income tax returns or audited financial information provided by an independent accountant. Therefore, if Quality wishes to claim inability to pay, please provide the FCC with copies of its federal income tax returns or audited financial statements for the last three years.

Quality should submit either this financial documentation of inability to pay or the $3,000 monetary forfeiture penalty within 30 days. Please submit the forfeiture payment by check or money order payable to the Federal Communications Commission. Please place the number 3153462-92004 on the check. The forfeiture payment should be sent to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If you wish to submit documentation regarding inability to pay, please send it to:

Federal Communications Commission
Higher Level Review, Enforcement Division
Field Operations Bureau
1919 M Street, N.W., Room 744 (1500E3)
Washington, D.C. 20554

If neither the forfeiture payment nor documentation concerning inability to pay is submitted within 30 days, the forfeiture case may be referred to the U.S. Attorney for collection through a civil suit. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-362

In the Matter of

Amendment of Section 73.202(b),	RM-6694
Table of Allotments,	RM-6893
FM Broadcast Stations.	
(Monroeville and Thomasville	
Alabama)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 28, 1992; Released: September 24, 1992

By the Chief, Policy and Rules Division:

1. Before the Commission is a Petition for Reconsideration of the *Report and Order* in this proceeding, 5 FCC Rcd 7027 (1990), filed by WJDB Radio, Inc. ("WJDB"), licensee of Station WJDB(FM), Channel 237A, Thomasville, Alabama.[1] Arrow Communications of Alabama, Inc. ("Arrow"), licensee of Station WFFX(FM), Tuscaloosa, Alabama, filed an opposition to the petition for reconsideration.[2]

2. The *Report and Order* denied a petition for rule making filed by WJDB, to substitute Channel 244C2 for Channel 237A at Thomasville, as being technically deficient. After the close of the comment period to the *Notice of Proposed Rule Making*, 4 FCC Rcd 6471 (1989), Juanina, Inc. notified the Commission of an error in the Commission's database concerning Juanina's permit for Channel 234C, Fort Walton Beach, Florida. The database incorrectly listed Channel 234 as a Class C1 facility instead of a Class C facility. Therefore, the proposed use of Channel 244C2 at Thomasville, Alabama, would be 28 kilometers (17.4 miles) short spaced to the construction permit for Channel 243C at Fort Walton Beach. The *Report and Order* refused to consider WJDB's request for an alternative substitution of Channel 238C3 for Channel 237A, filed in response to Juanina's claim, determining that the request constituted an untimely filed counterproposal.

3. WJDB's primary allegation is that the Commission erred in refusing to consider its late filed counterpropsal. WJDB claims that the series of events leading to the filing of the counterproposal were such that to refuse acceptance denied WJDB a meaningful opportunity to participate in the rule making process. WJDB claims that it had no notice of the technical deficency with respect to Fort Walton Beach until after the close of the comment period. It claims that its counterproposal was filed at the first opportunity to respond to Juanina's late filed comments which indicated that there was a deficiency in its proposal, and that such deficiency was due to an error in the Commission's database.[3] WJDB requests that its counterproposal be accepted and granted and a substitution of Channel 238C3 for 237A at Thomasville, Alabama be made.[4]

4. In an effort to protect its continuing interest in the allotment of Channel 238C3 at Thomasville, Alabama, WJDB initiated a separate rule making proceeding, prior to the release of the *Report and Order* in this proceeding. That rule making petition was granted and a substitution of Channel 238C3 for Channel 237A and modification of WJDB's license has been made in MM Docket No. 90-563, *Report and Order*, 57 Fed. Reg 31970, July 20, 1992. That decision is no longer subject to review. Therefore, the relief requested by WJDB in the present petition for reconsideration has been granted.

5. IT IS THEREFORE ORDERED, That the Petition for Reconsideration filed by WJDB Radio, Inc. IS DISMISSED as moot.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] Public notice of the filing of WJDB's petition was given on January 15, 1990, Report No. 1834.

[2] Due to the resolution herein, we need not discuss Arrow's opposition.

[3] Although we need not address the merits of WJDB's petition, we note that Section 0.434(e) of the Commission's Rules states that the Commission's databases constitute an unofficial source of information.

[4] WJDB also addresses arguments relating to the *Notice* in MM Docket No. 90-563. That proceeding is not at issue here and we will not entertain arguments outside the scope of this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-56

In the Matter of

Amendment of Section 73.202(b), RM-7551
Table of Allotments,
FM Broadcast Stations.
(Bay City and Edna, Texas)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 28, 1992; Released: September 24, 1992

By the Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration filed by Roy E. Henderson ("Henderson") directed to the *Report and Order* in this proceeding. 7 FCC Rcd 4135 (1992). The *Report and Order* upgraded Station KXGJ, Channel 241C2, Bay City, Texas, to specify operation on Channel 269C1, and substituted Channel 241A for Channel 269A at Edna, Texas. For the reasons discussed below, we deny the Petition for Reconsideration.

BACKGROUND

2. The *Notice of Proposed Rule Making* in this proceeding proposed the substitution of Channel 269C1 for Channel 241C2 at Bay City, and modification of the construction permit of Station KXGJ to specify operation on Channel 269C1. 7 FCC Rcd 2306 (1992). In order to accommodate this upgrade, the *Notice* also proposed the substitution of Channel 241A for Channel 269A at Edna, Texas. In response to the *Notice*, Ammerman Enterprises, Inc., permittee of Station KXGJ, filed comments and reply comments supporting the proposal. Henderson also filed comments and reply comments. In his comments, Henderson noted that in MM Docket No. 90-90, he had filed a counterproposal involving multiple channel substitutions looking toward a Channel 285C1 upgrade for Station KMIA, Rosenberg, Texas. Included among the proposed channel substitutions were the substitution of Channel 241A for Channel 269A at Edna, and the substitution of Channel 269C2 for Channel 241C2 at Bay City. MM Docket No. 90-90 remains pending. With respect to this proceeding, Henderson contended that his counterproposal in MM Docket No. 90-90 should have been referenced in the *Notice*, and that MM Docket No. 90-90 should be resolved in conjunction with this proceeding.

3. During this proceeding, we also received a letter from Congressman Jack Fields. In his letter, Congressman Fields expressed concern on the delay in resolving a related proceeding in MM Docket No. 89-459, in which Henderson also filed a counterproposal, as well as Docket No. 90-90. In addition, Congressman Fields noted that the proposed substitution of Channel 241A for Channel 269A at Edna, Texas, in this proceeding had been earlier suggested by Henderson in MM Docket No. 90-90. In a separate letter response to Congressman Fields's inquiry, the Chief of the Mass Media Bureau stated that the proposed channel substitution at Edna and upgrade at Bay City were necessary to grant the maximum number of proposals in MM Docket No. 89-459. The letter stated that at the conclusion of this proceeding, MM Docket No. 89-459 would be resolved on an expedited basis. The letter also noted that an upgrade at Bay City and channel substitution at Edna would not prejudice the resolution of MM Docket No. 90-90 in any manner.[1]

4. The *Report and Order* upgraded Station KXGJ to specify operation on Channel 269C1, and substituted Channel 241A for Channel 269A at Edna. In the *Report and Order*, we rejected any contention that we should delay action in this proceeding pending resolution of MM Docket No. 90-90. We specifically noted that resolving this proceeding enables us to resolve the earlier proceeding in MM Docket No. 89-459. We also noted our awareness that Henderson filed a counterproposal in MM Docket No. 90-90 involving the substitution of Channel 269C2 for Channel 241C2 at Bay City and Channel 241A for Channel 269A at Edna. In this connection, we stated that our action in this proceeding does not prejudice the Henderson counterproposal in MM Docket No. 90-90, and that Henderson's counterproposal has no decisional significance in this proceeding.

5. In his Petition for Reconsideration, Henderson states that the letter from Congressman Fields was filed by the May 18, 1992, comment date in this proceeding and was served on the other party in this proceeding. As such, Henderson contends that the letter should be considered as timely filed comments in MM Docket No. 92-56 and requests that the *Report and Order* be reconsidered with "full consideration and recognition" of the letter from Congressman Fields.

6. The Petition for Reconsideration is without merit. The letter from Congressman Fields did not address the merits of either the proposed upgrade for Station KXGJ or the proposed channel substitution at Edna. It merely expressed concern on the delay in resolving MM Docket No. 89-459 and MM Docket No. 90-90, and requested Bureau comment on why the *Notice* in this proceeding did not refer to the fact that the proposed Edna channel substitution had been earlier suggested in MM Docket No. 90-90. The Bureau response to Congressman Fields's letter addressed both of these concerns. These concerns were also addressed in the *Report and Order* in response to the comments filed by Henderson. We continue to believe that our practice of addressing the concerns expressed by Congressional inquiries by separate correspondence is conducive to the efficient transaction of Commission business. Furthermore, our action did not affect the outcome of MM Docket No. 92-56. Therefore, we deny the Petition for Reconsideration.

[1] *See* Letter from Chief, Mass Media Bureau to Congressman Jack Fields (June 12, 1992).

7. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Roy E. Henderson IS DENIED.

8. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-651

In the Matter of

Amendment of Section 73.202(b), RM-7544
Table of Allotments,
FM Broadcast Stations.
(Bald Knob and Clarendon, Arkansas)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 31, 1992; Released: September 24, 1992

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration filed on behalf of John Paul Capps and Elizabeth Capps, d/b/a Capps Radio Company ("Capps" or "petitioner"), of the *Report and Order* in this proceeding, 6 FCC Rcd 7435 (1991), which denied Capps' petition for rule making seeking the substitution of Channel 296C3 for Channel 296A at Bald Knob, Arkansas, and modification of the license issued to John Paul Capps for Station KKSY(FM) accordingly.[1] Petitioner also requested the substitution of Channel 281A for Channel 297A at Clarendon, Arkansas, and modification of the construction permit issued to B and H Broadcasting Company for Station KXRC(FM), to accommodate its proposal. For the reasons discussed below, we will grant Capps' petition for reconsideration.

2. Capps proposed a reference site located 23 kilometers (14.3 miles) southwest of the community.[2] Based on an average terrain elevation of 84.9 meters at the reference site, Capps calculated that a 70 dBu signal would extend 25.2 kilometers (15.7 miles).[3] Since the 70 dBu signal of a Class C3 allotment is assumed to extend a distance of 23.2 kilometers (14.4 miles) from the farthest boundary of the community, Capps assumed its proposal was consistent with the requirements of Section 73.315(a) of the Commission's Rules. However, the *Report and Order* denied the proposal for failure to demonstrate that, from its referenced site, the station could provide line of sight coverage over the entire principal community given a terrain obstruction within the city limits of Bald Knob. In this regard, we determined that in order to comply with Section 73.315(a) the required radiation center of the antenna for Channel 296C3 must be 365.1 meters (226.9 feet) above mean sea level ("AMSL"). As a result, we concluded that a tower of 280 meters (918 feet) would be required at the petitioner's reference site. Since the maximum height above average terrain for Class C3 facilities is 100 meters (328 feet), our analysis concluded that pursuant to Section 73.211 of the Commission's Rules, the effective radiated power ("ERP") must be reduced to 3.19 kW, which is below the minimum 6.1 kW for a Class C3 allotment. Therefore, it was determined that petitioner failed to demonstrate its proposal would comply with the requirements of Section 73.315 of the Commission's Rules.

3. Capps asserts that the Commission erred in analyzing the terrain profile since we did not consider that the propagation chart (F(50,50) curves) contained in Section 73.333 of the Commission's Rules, which is used to predict signal levels, is premised on an assumed receiving antenna height in the community of 9 meters (30 feet) above ground level. Capps provided terrain profile graphs for a bearing of 49^0 through 55^0 (using 30 second topographic data), plotted from its referenced site to a distance of 25.74 kilometers (16 miles). Based on an average terrain of 85.1 meters (279 feet) at the referenced site, which places the center of radiation at 185.1 meters (607 feet) AMSL, and by employing a 9 meter (30 feet) above ground receiving antenna, as specified in Section 73.314(c)(2) of the Commission's Rules, Capps's consulting engineer demonstrated that the entire community of Bald Knob would receive the required 70 dBu signal.

4. On the basis of the above, a further staff engineering analysis confirms that our finding in the *Report and Order* was incorrect. Petitioner has adequately demonstrated that from its intended site, employing the provisions of Section 73.314(c)(2) of the Commission's Rules, its proposal complies with the requirements of Section 73.315 of the Commission's Rules. Therefore, we will grant Capps' petition for reconsideration since it could provide Bald Knob with a wide coverage area FM service and enable Station KKSY(FM) to expand its service area.

5. As indicated in the *Notice*, the Bald Knob modification requires B and H Broadcasting Company ("B&H"), permittee of Station KXRC(FM), Channel 297A, Clarendon, Arkansas, to change its frequency to Channel 281A. Although B&H did not respond favorably to the *Order to Show Cause* why its permit should not be modified,[4] neither did it demonstrate sufficient cause why Channel 281A should not be substituted for Channel 297A at Clarendon.

6. Channel 296C3 can be allotted to Bald Knob at Capps's specified site[5] in conformity with the Commission's Rules. Additionally, Channel 281A can be substituted for Channel 297A at Clarendon at the site specified

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[1] Public Notice was given on February 18, 1992, Report No. 1878.

[2] Coordinates at Capps' referenced site for Channel 296C3 are 35-11-10 and 91-46-13.

[3] Capps' calculations, based upon the NGDC 30 second terrain database and the Commission's F(50,50) curves (Section 73.333, assumed an ERP of 25.1 kW (14.0 dBk) and an antenna height above average terrain of 118 meters (387 feet) along the 53^0 radial.

[4] B&H counterproposed the substitution of Channel 297C3 for Channel 297A at Clarendon and modification of its construction permit accordingly, as well as the substitution of non-adjacent Channel 289C3 for Channel 296A at Bald Knob. The proposal was rejected based on numerous substantive and procedural deficiencies. B & H did not seek reconsideration of that determination.

[5] Coordinates at the reference site for Channel 296C3 are

in the construction permit issued to B&H,[b] consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

7. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station KKSY(FM) to specify operation on Channel 296C3 in lieu of Channel 296A at Bald Knob. Additionally, we are modifying the construction permit for Station KXRC(FM) to specify operation on Channel 281A in lieu of Channel 297A at Clarendon. Capps is required to reimburse B&H for the costs associated with the modification of its facilities, and has stated its willingness to do so. *See Circleville, OH*, 8 FCC 2d 159 (1967).

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 9, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Bald Knob, Arkansas	296C3
Clarendon, Arkansas	281A

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of John Paul Capps (BLH-841214KZ) for Station KKSY(FM) IS MODIFIED to specify operation on Channel 296C3 in lieu of Channel 296A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of B and H Broadcasting Company for Station KXRC(FM), File No. BPH-891002MN, Clarendon, Arkansas, IS MODIFIED to specify operation on Channel 281A in lieu of Channel 297A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KXRC(FM)'s permit (File No. BPH-891002MN), except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for a construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with permit BPH-891002MN, except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

11. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, John Paul Capps, licensee of Station KKSY(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade at Bald Knob.

12. IT IS FURTHER ORDERED, That the petition for reconsideration filed on behalf of Capps Radio Company IS GRANTED.

13. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to B and H Broadcasting Company, 4004 Clay Drive, Jonesboro, AR 72401.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

35-11-10 and 91-46-13.

[b] Coordinates at the site specified in the construction permit issued for Station KXRC(FM) are 34-37-19 and 91-22-46.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-216

In the Matter of

Amendment of Section 73.202(b),	RM-8068
Table of Allotments,	
FM Broadcast Stations.	
(Clearwater and Rozel,	
Kansas)	

NOTICE OF PROPOSED RULE MAKING

Adopted: August 31, 1992; Released: September 24, 1992

Comment Date: November 16, 1992
Reply Comment Date: December 1, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Gary Violet ("petitioner") requesting the substitution of Channel 254C2 for Channel 254A at Clearwater, Kansas. Petitioner also requests modification of his construction permit (BPH-910412MD) for Channel 254A to specify operation on Channel 254C2. Petitioner submitted information in support of the proposal and expressed his intention to apply for the channel, if allotted.

2. Petitioner's proposal requests the substitution of Channel 235C1 for Channel 254C1 at Rozel, Kansas, or the reallotment of Channel 254A to Rozel to accommodate the substitution at Clearwater. Petitioner states that the construction permit for Station KGZE, Channel 254A, was modified to specify operation on Channel 254C1 in MM Docket 91-223, effective December 16, 1991, 6 FCC Rcd 6116 (1991). Petitioner further states that the permittee of Channel 254A, Lee F. Scott, has not filed an application for Channel 254C1 and that the construction permit for Channel 254A expired on June 28, 1991.

3. We believe petitioner's proposal warrants consideration because the proposed substitution would provide Clearwater and the surrounding area with expanded service. Channel 254C2 can be allotted to Clearwater, Kansas, in compliance with the Commission's spacing requirements provided a channel substitution is made at Rozel, Kansas.[1] We shall also propose to modify the construction permit for Channel 254A, Clearwater, Kansas, to specify operation on Channel 254C2 in accordance with Section 1.420(g) of the Commission's Rules. Since the construction permit for Channel 254A was cancelled and the call sign for Station KGZE(FM) was deleted at Rozel, Kansas, we shall propose the substitution of Channel 235C1 for Channel 254C1 at Rozel.[2] Channel 235C1 can be allotted to Rozel at a site 7 kilometers (4.3 miles) northwest of the community.[3] The site restriction will prevent a short spacing to Station KICT-FM, Channel 236C1, Wichita, Kansas. We will open a new filing window for the channel upon termination of this proceeding if interest is expressed in retaining a channel in Rozel. However, if no interest is expressed for a channel at Rozel, we will delete Channel 254C1 without replacement, and no new allotment will be made to the community.

4. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following communities:

OPTION I

	Channel No.	
City	Present	Proposed
Clearwater, Kansas	254A	254C2
Rozel, Kansas	254C1	235C1

OPTION II

Clearwater, Kansas	254A	254C2
Rozel, Kansas	254C1	---

5. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Receipt Requested to the following: Lee E. Scott, Box 125, Rozel, Kansas 67574.

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **November 16, 1992,** and reply comments on or before **December 1, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Donald E. Johnson
Blair Joyce & Silva
1825 K Street, N.W.
Washington, D.C. 20006

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[1] The coordinates for Channel 254C2 at Clearwater are 37-23-31 and 97-35-55.

[2] The construction permit (BPH-890217MP) for Channel 254A, Station KGZE(FM), Rozel, Kansas, was cancelled on June 2, 1992.

[3] The coordinates for Channel 235C1 at Rozel are 38-13-42 and 99-28-27.

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments. Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 16, 1992

Released: September 24, 1992

Mr. Thomas M. Crane 8310-FC
Mid-Coast Radio Project, Inc. C2-342
Licensee, Radio Station KKFI(FM) C5-536
1627 Main Street, Suite 300
Kansas City, MO 64108

Dear Mr. Crane:

This constitutes a NOTICE OF APPARENT LIABILITY for a forfeiture against Mid-Coast Radio Project, licensee of noncommercial Station KKFI(FM), Kansas City, Missouri, pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On February 11, 1992, the Commission received a complaint alleging that on February 7, 1992, during regular business hours, the complainant was denied access to the station's public inspection file. Based on this complaint, the Commission sent you a letter of inquiry on March 24, 1992. In your response, dated May 21, 1992, you state that on February 7, 1992, at 10:00 a.m., the complainant's request for access to the station's public files was delayed by a few hours because there were no professional staff members present at KKFI(FM) when the complainant visited the station. Instead, the station was attended by two volunteers who were unfamiliar with KKFI(FM)'s public file. The complainant was asked to make an appointment after 12:00 noon that same day when a staff person familiar with the public file would be present. The complainant declined this offer, but returned to the station on the following morning, requested the public file, and was immediately given access to the file. You indicate that, because there was a reduction in funding, KKFI(FM) was unable to employ a professional staff requiring it to have some volunteer staffing during regular business hours. You contend that KKFI(FM) did not intentionally violate Section 73.3527(d) of the Rules or deny the right to inspect documents which are to be made available to the public. You indicate that, to assure that access to the KKFI(FM) files is not delayed in the future, Mid-Coast has relocated its public file to the studio of noncommercial station KCUR(FM).

Based on the foregoing, and by your own admission, Radio Station KKFI(FM) has violated Section 73.3527(d) of the Commission's Rules by failing to make the station's public inspection file available to the complainant on February 7, 1992, at approximately 10:00 a.m., during regular business hours.

We note that this is not the first time a member of the public has had a problem obtaining access to your public inspection file. On September 25, 1991, we admonished you for a similar violation that occurred on March 25, 1991. It does not appear that the admonishment was sufficient to impress upon you the importance of our public file rule or to assure compliance.

Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Mid-Coast Radio Project, licensee of Radio Station KKFI(FM), Kansas, Missouri, is hereby advised of its Apparent Liability for a Forfeiture in the amount of $2,500 for its apparent willful violation of Section 73.3527(d) of the Commission's Rules. The amount of the forfeiture was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act and in our recently adopted *Policy Statement, standards for assessing forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied* FCC 92-212 (released June 4, 1992). Under these standards, $7,500 is the base forfeiture amount for the violation of Section 73.3527(d) of the Commission's Rules. We have reduced this amount by application of the established adjustment criteria.

In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-126

In the Matter of

Amendment of Section 73.202(b), RM-7993
Table of Allotments,
FM Broadcast Stations.
(White Stone, Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 27, 1992; Released: September 25, 1992

By the Chief, Allocations Branch:

1. At the request of Windmill Communications ("petitioner"), permittee of Station WNDJ-FM, Channel 261A, White Stone, Virginia, the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 3906 (1992), proposing the substitution of Channel 285A for Channel 261A at White Stone and the modification of Station WNDJ-FM's construction permit to specify operation on Channel 285A. Petitioner filed comments reiterating its intention to apply for Channel 285A, if allotted to White Stone. No other comments were received.

2. We believe the public interest would be served by substituting Channel 285A for Channel 261A at White Stone since it could provide the community with an improved FM service. Channel 285A can be allotted to White Stone in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.7 kilometers (4.2 miles) northwest to accommodate petitioner's desired site.[1] As requested, we will also modify Station WNDJ-FM's construction permit to specify operation on Channel 285A.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 9, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
White Stone, Virginia	285A

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Windmill Communications, for Station WNDJ-FM, White Stone, Virginia, IS MODIFIED to specify operation on Channel 285A, in lieu of Channel 261A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 285A at White Stone are North Latitude 37-42-00 and West Longitude 76-26-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION INTERNATIONAL, INC. File No. I-T-C-92-132

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate INTELSAT circuits between Guam and points in the Pacific Ocean Region, and between Guam and Canada.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 15, 1992; Released: September 24, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision by Western Union International, Inc. (WUI) of direct service between Guam and the points listed in Attachment 1, and between Guam and Canada.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-132 IS GRANTED, and WUI is authorized to:

a. lease from Comsat and operate an additional 415 voice-grade satellite circuits between the Pulantat-3A earth station in Guam and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar circuits between the satellite and earth stations in the points specified in Attachment 1, furnished by WUI's correspondents;

b. lease from MCI International, Inc. (MCII) and operate an additional 415 voice-grade circuits on the Pulantat-3A earth station;

c. lease and operate the circuits in (a) and (b) above to each point listed in Attachment 1, not to exceed a total of 568 circuits[1] among the points for the period of 1992-1995, for the provision of WUI's authorized services between Guam and the points specified in Attachment 1;

d. lease from Comsat and operate 12 voice-grade satellite circuits between the Pulantat-3A earth station in Guam and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in Canada, furnished by WUI's correspondent in Canada;

e. lease from MCII and operate 12 voice-grade circuits on the Pulantat-3A earth station;

f. use the facilities in (d) and (e) above for the provision of WUI's authorized services between Guam and Canada; and

g. lease and operate appropriate connecting facilities.

3. IT IS FURTHER ORDERED that the Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure non-discriminatory use of, and equitable access to, the communications satellite system.

4. IT IS FURTHER ORDERED that any authorization of WUI to provide private lines is limited to the provision of such private lines between Guam and the points listed in Attachment 1, and between Guam and Canada -- that is, private lines which originate in Guam and terminate either in the points listed in Attachment 1 or in Canada, or which originate either in the points listed in Attachment 1 or in Canada and terminate in Guam. In addition, WUI may not -- and WUI's tariff must state that WUI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S.[2] or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign point affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *petitions for reconsideration pending*.

5. IT IS FURTHER ORDERED that no material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between WUI and its correspondent in the applicable foreign point, and WUI shall file copies of the agreement with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED that neither WUI nor any persons or companies controlling or controlled by WUI, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which WUI or any persons or companies controlling or controlled by WUI are parties.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

8. IT IS FURTHER ORDERED that WUI shall file a new application for additional facilities to points specified in Attachment 1 on or before October 1, 1995.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT 1

American Samoa
Australia
Hawaii
Hong Kong
Japan
Korea
Federated States of Micronesia
Palau
Philippines
Saipan
Singapore
Taiwan
Thailand
U.S. Mainland

FOOTNOTES

[1] On August 8, 1986, the Commission released an order authorizing RCA Global Communications, Inc. (RCAG) to lease from Comsat and operate up to a total of 153 voice-grade satellite circuits for the provision of RCAG's regularly authorized services between Guam and the points listed in Attachment 1, (*See* File No. I-T-C-86-122, Mimeo No. 6204, released August 8, 1986). On March 30, 1990, the Commission authorized RCAG to transfer its licenses and permits, including those RCAG formerly held for the provision of services from Guam to the U.S. and international points, to WUI.

[2] As used in this order, the U.S. includes the U.S. mainland, Hawaii, Alaska, Guam, Puerto Rico and the U.S. Virgin Islands.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-91-088

For authority pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to upgrade its Southbury, Connecticut land earth station (WA-28) facilities with Inmarsat Standard C capability and to provide Inmarsat Standard C services in the Atlantic Ocean Region-West

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-91-089

For authority pursuant to Section 504(c) of the International Maritime Satellite Communications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to upgrade its Santa Paula, California land earth station (KA-31) facilities with Inmarsat Standard C capability and to provide Inmarsat Standard C services in the Pacific Ocean Region

MEMORANDUM, OPINION, ORDER AND AUTHORIZATION

Adopted: September 16, 1992; Released: September 24, 1992

By the Chief, International Facilities Division:

1. On October 21, 1991, the Communications Satellite Corporation (Comsat) filed a petition for reconsideration in part of the Order in the above-referenced proceeding, *Communications Satellite Corporation*, 6 FCC Rcd 5765 (1991), pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. §1.106. Comsat asks reconsideration of the part of the decision that denied authorization to provide Inmarsat C service to aeronautical users. Comsat states that circumstances have changed since it filed its original applications, and submits updated information which it argues warrants the requested reconsideration in part. No oppositions have been received. For the reasons set forth below, we grant the requested reconsideration in part.

2. Comsat's original applications sought authority to provide Inmarsat Standard C (C-link) maritime satellite service, aeronautical satellite services to aircraft in international flight and certain international land mobile satellite service (LMSS) in the Atlantic Ocean Region-West (AOR-W) and Pacific Ocean Region (POR) via the Inmarsat first and second generation satellites,[1] and to upgrade the Southbury, Connecticut, land earth station (LES) (WA-28) and Santa Paula, California, LES (KA-31) with Inmarsat Standard C capability. We granted the applications insofar as they requested authority for maritime services, subject to certain conditions. We deferred consideration of the use of Inmarsat Standard C for LMSS to Comsat's pending application File No. I-T-C-91-139, and dismissed Comsat's request to use Inmarsat Standard C for international aeronautical mobile satellite service. With regard to Comsat's request to provide Inmarsat Standard C aeronautical service to aircraft in international flight, we noted that Comsat referred to this as a "potential" service that "may be used to provide certain aeronautical communications.... If this service materializes, it could be initially provided with Inmarsat C signals." No further information was provided and Comsat had removed its references to aeronautical service from its land earth station applications.[2] We found that Comsat's proposed use of Inmarsat Standard C service for international aeronautical mobile satellite service was too speculative, and we dismissed it without prejudice as premature.

3. Comsat now states that recent technological and market developments have moved C-link aeronautical service from the realm of the hypothetical to the brink of commercialization and competition. Comsat states that Inmarsat Standard C service to aeronautical users involves the same technical specifications and identical transmissions to provide the same basic data and messaging services provided to maritime users. No further land earth station modifications are required. Comsat further alleges that several terminal manufacturers have undertaken the development of Inmarsat C terminals for aircraft and Comsat predicts the availability of such terminals by the end of 1991. Comsat says that interest in this service has grown rapidly, especially in the corporate and private jet market and from U.S. civil agencies and units of the Department of Defense.

4. Comsat states that the provision of Inmarsat C service to aeronautical users will extend to aircraft a reliable, high-quality, low-cost data communications alternative to meet their needs for safety, administrative and commercial communications such as position reporting, aircraft performance reporting, long-range monitoring of changing weather conditions, and routine messaging. According to Comsat, it will make the quality and reliability of modern Inmarsat communications available to many smaller aircraft for which aeronautical satellite communications would otherwise be economically infeasible, and where normal air-to-ground communications are not available. For commercial and other large aircraft, it will allow a backup or supplemental cockpit availability. Comsat also maintains that provision of Inmarsat C service to aeronautical users will promote U.S. competitiveness and improve the U.S. balance of payments.

5. The Commission's Rules allow a petition for reconsideration to be based on facts not previously presented to the Commission where those facts relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters. 47 C.F.R.

§1.106(c)(1). The facts presented by Comsat in its petition have evolved since the filing of the original pleadings in this proceeding. Although we did not at that time have enough information to allow us to make a decision on the aeronautical proposal, the new information provides us an adequate basis to determine whether this service is in the public interest.

6. The Commission has previously determined that it may authorize Comsat to provide Inmarsat satellite services to aircraft in international flight as defined in CC Docket No. 87-75. *Provision of Aeronautical Services via the Inmarsat System*, 4 FCC Rcd 6072, 6085-87 (1989) (hereinafter *International Aeronautical Order*). It has also determined that Comsat may provide interim domestic aeronautical satellite service via the Inmarsat system until the domestic U.S. MSS system is operational. *Aeronautical Radio, Inc. and the Air Transport Association of America*, 7 FCC Rcd 1006, 1007 (1992) (hereinafter *Interim Domestic Aeronautical Order*). Therefore, we need now consider only whether Inmarsat C service to aeronautical users will serve the public interest. We conclude that it will be in the public interest to allow Comsat to provide Inmarsat Standard C service to aircraft in international flight as defined in CC Docket No. 87-75, and to aircraft in domestic flight on an interim basis until the domestic MSS system is operational.[3] Inmarsat Standard C service will make available to some aeronautical users a type of communication not previously available. The record in this proceeding fails to demonstrate any reason for denial of this petition for reconsideration. Furthermore, we believe that U.S. policy should be designed to ensure timely and effective U.S. entry into the markets for new services. We conclude that this goal will be furthered by grant of the instant petition.

7. Prior to regular use, aircraft earth stations (AES) aboard U.S. aircraft must be authorized under Part 87 of the Commission's Rules, 47 C.F.R. Part 87. The Commission has recently adopted licensing procedures and equipment technical standards for AES in PR Docket No. 90-315.[4] Therefore, any use of AES aboard U.S. aircraft will be required to meet the technical standards and operational conditions established therein.

8. Accordingly, pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. §1.106, Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. § 753(c), IT IS ORDERED that the petition for reconsideration in part of the Communications Satellite Corporation IS GRANTED and Comsat is authorized to provide Inmarsat Standard C (C-link) satellite service to aeronautical users as described herein in the Atlantic Ocean Region-West and Pacific Ocean Region.

9. IT IS FURTHER ORDERED that Comsat shall, pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, file a tariff for the services authorized in this order before offering services to the public.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for Reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The U.S. Table of Frequency Allocations in Section 2.106 of the Commission's Rules allocates 1530-1544 and 1626.5-1645.5 MHz only to maritime mobile satellite service, but the Commission has granted a temporary waiver to allow provision of aeronautical mobile satellite service (R) (AMSS(R)) and mobile satellite service (MSS) in these frequencies. *Communications Satellite Corporation and American Mobile Satellite Corporation Requests for Interim Waiver of Section 2.106 of the Commission's Rules to Provide AMSS(R) and MSS Services in the Maritime Bands 1530-1544 MHz and 1626.5-1645.5 MHz*, 5 FCC Rcd 4117 (1990). The first generation Inmarsat satellites operate entirely within these frequency bands, while the second generation space segment includes these plus 1545-1548 and 1646.5-1649.5 MHz, which are allocated to AMSS(R) with MSS as a secondary service. Inmarsat non-AMSS(R) communications such as airline passenger communications must therefore be provided as a mobile satellite service and comply with the requirements for protection of AMSS(R) communications.

[2] *See* letter from Robert A. Mansbach, Comsat, to International Facilities Division, Common Carrier Bureau, dated September 25, 1991, in File Nos. CSG-91-129-P/L and CSG-91-130-P/L.

[3] Of course, Comsat will be expected to comply with all other aspects of the *International Aronautical Order* and the *Interim Domestic Aeronautical Order*, including developing a transition plan to move all domestic aeronautical traffic to the new U.S. domestic MSS system without disruption to customers.

[4] Amendment of Part 87 of the Commission's Rules to Establish Technical Standards and Licensing Procedures for Aircraft Earth Stations, PR Docket No. 90-315, FCC 92-392, released September 9, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Communications Satellite Corporation

Application for authority to participate in a program for the construction of Inmarsat Third Generation communications satellites to be used as part of the Inmarsat global satellite system — File No. CSS-91-001-LA

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: August 25, 1992; Released: September 25, 1992

By the Commission:

1. The Commission has under consideration the captioned application, filed on October 4, 1990, by the Communications Satellite Corporation (Comsat) seeking authority pursuant to Section 503(c) and (d) and 504(c)(1) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. §§ 753(c), (d), 754(c)(1) (Inmarsat Act), to participate in a program for the construction of up to four Inmarsat third generation (Inmarsat-3) communications satellites to be launched, deployed, and utilized commencing in 1994/1995 as part of the Inmarsat global satellite system. The application was placed on public notice on October 12, 1990. On November 13, 1990, Geostar Messaging Corporation (GMC) filed comments and American Mobile Satellite Corporation (AMSC) filed a petition to deny.[1] On December 5, 1990, Aeronautical Radio, Inc. (Arinc) filed a letter containing comments and Comsat filed an opposition and reply. On December 21, 1990, AMSC and GMC filed replies. On January 22, 1991, the U.S. Coast Guard (USCG) filed a letter containing comments.[2]

2. Comsat filed a supplement to its application on December 21, 1990. On February 7, 1991, AMSC filed comments on the supplement and on the USCG letter. On February 21, 1991, Comsat filed reply comments. On March 5, 1991, AMSC filed a response to Comsat's reply. On March 14, 1991, Comsat filed a further supplement with a request that the document be withheld from public disclosure pursuant to 47 C.F.R. §0.459. On May 1, 1991, AMSC filed a request that the further supplement be made available for public inspection. On May 16, 1991, Comsat and GE Technical Services Company, Inc. (GE) filed oppositions to AMSC's request.[3]

I. APPLICATION

3. Inmarsat provides international maritime services to ships and offshore facilities. Comsat states that since the Inmarsat system became operational in 1982, there has been a dramatic increase in the demand for and use of mobile communications worldwide. According to the Comsat application, as of October 1990 the Inmarsat system had approximately 12,000 commissioned terminals generating about 25 million minutes in telephone traffic and 21 million minutes in telex traffic annually. Telephone traffic has shown annual increases of 40 percent. Comsat states that the procurement of the Inmarsat-3 satellites is intended to satisfy the growing demand for established services (Inmarsat Standard A) as well as needed new services (Inmarsat Standard B, C, and M) which will further boost demand and increase capacity requirements. Comsat further points out that the initiation of Inmarsat aeronautical safety and business communications, the recent land mobile amendments to the Inmarsat Convention and Operating Agreement, and Inmarsat's new role in providing critical distress and safety communications satisfying the requirements of the GMDSS also add to the need for more capacity.

4. Comsat states that the small, limited power Inmarsat first generation (Inmarsat-1) satellites are fast approaching the end of their useful lives. It adds that system traffic demands have stretched beyond their limited capacity, and that there have been operational problems. Although Inmarsat changed its operational satellite plan for the second generation to a four-region configuration, Comsat states that the four Inmarsat second generation (Inmarsat-2) satellites serving as the operational satellites in all four ocean regions will be saturated as early as 1995.[4] The third generation satellites will be designed to meet demands for service from 1995 to the year 2005 and beyond.[5]

5. Comsat states that the manufacturing process requires approximately 42 months from the time the contract is signed to the delivery of the first satellite, and additional satellites would be delivered at four month intervals. Under current planning, the first Inmarsat-3 spacecraft will be launched in late 1994 or early 1995, with initial use to commence in 1995. To ensure that the satellites would be available on a timely basis, on October 2, 1989, Inmarsat issued a Request for Proposals (RFP) for the design and construction of the Inmarsat-3 series. At the Thirty-seventh Session of the Inmarsat Council in November 1990, the Council authorized the Director General to execute a procurement contract with GE for four Inmarsat-3 satellites. The decision to order four satellites took into consideration factors such as the split of the Atlantic Ocean Region, the possibility of higher than expected traffic levels, delays in construction or deployment including launch failures, and the need for reserve or restoration capacity.[6] The total cost of the Inmarsat-3 procurement was estimated in the December 21, 1990, supplemental filing at $700 million.

6. Comsat states that unlike the Inmarsat-2 spacecraft which use only global beam coverage, Inmarsat-3 will utilize a global beam and five spot beams. According to Comsat, this will support low-cost terminals and a wider range of services. The global beam will provide continuation of existing services and carry spot-beam compatible traffic outside of the spot-beam coverage areas. The spot beams will provide cost-effective and spectrum efficient service to the growing populations of small and inexpensive earth stations in densely populated areas. Comsat

claims that flexible power reassignment among the beams will enable the reuse and sharing of frequencies and hence make more efficient use of limited spectrum resources and allow lower per-channel communications costs.

7. The Inmarsat-3 satellites will have minimum L-band power capabilities of 48 dBW. According to Comsat, some of the total L-band power may be needed to compensate for less than optimal bandwidth availability due to inadequate spectrum allocation and for interference caused by other systems. The 48 dBW will be shared between the five spot beams and the global beam. An EIRP of 37 dBW will typically be required throughout the life of the spacecraft to support the traffic in the global beam. The design incorporates flexible EIRP adjustment among the spot beams and the global beam, as well as flexible bandwidth and spectrum utilization. Comsat says that with frequency reuse, the total usable bandwidth will not be less than 140 percent of the specified bandwidth.

8. Comsat states that the spacecraft will receive feeder link transmissions from the fixed earth stations through the global beam at frequencies between 6425 MHz and 6454 MHz, for retransmission between 1530 MHz and 1559 MHz through the spot and global beams to mobile earth stations. The spacecraft will receive mobile communications signals through the spot and global beams in the frequency band 1625.5-1660.5 MHz. The retransmission of these signals to the fixed earth stations via the global beam will be in the frequency band 3600-3629 MHz. Although for portions of those bands the Commission has allocated on a primary basis, or has given priority to, the aeronautical mobile satellite (AMSS(R)) services, Comsat says that the Inmarsat-3 sattllite is designed to be able to utilize the entire bands in order to allow Inmarsat outside the United States to make use of those AMSS(R) frequencies. The Council also authorized an additional 5 MHz of bandwidth covering the frequency range 1525-1530 MHz[7] in the forward direction to match the corresponding 1626.5-1631.5 MHz subband in the return direction. Use of this additional frequency band, according to Comsat, would be contingent upon approval of such use at the 1992 World Administrative Radio Conference (WARC), as well as upon international frequency coordination.[8] Comsat states that other possible frequency assignments include (1) an optional spacecraft capability for the reception of navigational positioning signals in the frequency band 6454.5-6456.7 MHz for retransmission to users in the frequency band 1574.4-1576.6 MHz, and also for simultaneous transmission of the same signals to reference earth stations in the frequency band 3629.5-3631.7 MHz; (2) an optional spacecraft capability for the reception of order wire and signalling traffic from fixed earth stations in the frequency band 6439.2-6439.8 MHz and for retransmission to other fixed earth stations in the frequency band 3614.2-3614.8 MHz; (3) an optional spacecraft capability for the reception of mobile communications signals in the frequency band 1640.85-1641.85 MHz and retransmission to mobile earth stations in the frequency band 1539.35-1540.35 MHz.

9. As for launch vehicles, Comsat states that the spacecraft are designed to be compatible with several existing launchers, thus enabling Inmarsat to take advantage of competition in the market for launch services. Comsat states that Inmarsat's selection of launch vehicles will comport with all applicable U.S. legal requirements.

II. DISCUSSION

A. The Spectrum Capabilities of the Proposed Inmarsat-3 Spacecraft and Frequency Interference Questions

10. In its petition, AMSC explains that it is the grantee of a license to construct and operate the space segment for what is to be the sole domestic Mobile Satellite Service (MSS) system in 28 MHz of spectrum in the upper L-band.[9] It says that the Commission recognized that the international coordination process was likely to reduce the spectrum available to the U.S. system, and, indeed, AMSC argues that the Inmarsat-3 system as proposed will cause harmful interference to AMSC's proposed U.S. system throughout its entire band. AMSC complains that Inmarsat already operates using 33 MHz of spectrum in the adjacent Maritime Mobile Satellite Service (MMSS) band, and uses 3 MHz (in each direction) of the 28 MHz MSS band for an aeronautical package.[10] AMSC asserts that the Executive Branch has directed that the new system should not go forward in more than that 3 MHz (in each direction) of the MSS band, and that the Commission is therefore precluded from authorizing the Inmarsat-3 system.[11] AMSC states that the Inmarsat-3 satellites would have ten times the power of the Inmarsat-2 satellites, and that operation of Inmarsat's new satellites at four of the five proposed orbit locations would cause substantial interference to AMSC's operations throughout the entire 28 MHz of the MSS band. AMSC alleges that the Inmarsat-3 system is extremely inefficient in its existing and proposed use of the spectrum, involving overly broad channels, an inefficient frequency plan, insufficient directivity and beam isolation, and a dilatory phase-out of inefficient mobile equipment. According to AMSC, Inmarsat should not need to operate in the MSS band beyond the relatively small portion of the band suggested in the U.S. Signatory Statement.[12] AMSC also argues that as long as Inmarsat continues to propose to operate throughout the band assigned to AMSC, the Commission should not accept vague promises that the frequency interference problems will be reduced at some time in the future.

11. Comsat states that the Inmarsat-3 satellites are specifically designed to facilitate coordination with regional systems, including AMSC's proposed system. Comsat repeats that the Inmarsat-3 satellites were designed to include the entire L-band only to enable the use of those frequencies in regions other than over North America. Comsat says that the design does not mean that the Inmarsat-3 satellites will use that entire frequency band in all regions or that Inmarsat will operate the satellites in such a manner as to preclude AMSC's planned operations. Comsat states that the precise frequencies to be used by Inmarsat and AMSC will be determined through the international coordination process, and that the Inmarsat-3 satellites can operate without substantial interference to AMSC's system. Comsat cites a different segment of the U.S. Signatory Statement that says "[t]he Inmarsat-3 spacecraft should be advanced published for the full 14 MHz [in each direction]." Comsat argues that the U.S. Signatory Statement recognizes that the actual frequencies to be used by the Inmarsat satellite over North America will be a matter to be resolved in international frequency coordination meetings.

12. We note that Inmarsat is not proposing to construct a satellite specifically that will use all its potential frequencies in North America; rather, all of the satellites are to be constructed alike in order to realize certain efficiencies in cost and design interchangeability for the four

ocean regions. Further, we concur with Comsat that the U.S. position as expressed in the U.S. Signatory Statement does not preclude the building of an Inmarsat-3 system that has the capability of using the entire 28 MHz of upper L-band spectrum, or preclude the advance publication of these frequencies. The statement that Comsat made at the 33rd Council meeting merely emphasizes that spot beams are preferred to global beams, and predicts that Inmarsat-3 will not need all of the 28 MHz of spectrum over North America because the U.S. and Canada will be satisfying their domestic needs by operating separate domestic systems. The statement supports the advance publication of the full 28 MHz, but only with the understanding that there will be limited use of this spectrum in North America and that the requirement for spectrum should not exceed the 3 MHz in each direction associated with the Inmarsat-2 spacecraft. We conclude that procurement of the Inmarsat-3 system, which utilizes a combination of global beams and spot beams, and which, according to Comsat, will be coordinated so as not to cause harmful interference to the AMSC system, is not contrary to the position stated in the U.S. Signatory Statement. Furthermore, we do not believe that AMSC's worst case interference demonstrations are relevant in light of the obligation that all parties have to coordinate their systems in good faith. AMSC has not shown that such coordination is impossible. In fact, that coordination process is under way. The FCC is participating in a series of meetings to coordinate mobile satellite services in the bands 1525-1559 MHz and 1626.5-1660.5 MHz. The meetings involve proposed Canadian, Mexican and Russian systems as well as the AMSC and Inmarsat systems.

B. Legal Issues

13. AMSC argues that the Inmarsat Act prohibits Comsat from participating in any Inmarsat venture that goes beyond maritime communications in more than an ancillary fashion. It argues that Comsat does not have authority to provide land mobile services, and that the aeronautical authority granted in *Provision of Aeronautical Services Via the Inmarsat System* [13] extends only to Inmarsat-2 satellites. AMSC and GMC maintain that the Inmarsat-3 proposal reflects a shift in Inmarsat's fundamental purpose, from one limited to maritime communications to one that is expanded to mobile satellite communications generally, with no unique emphasis on maritime communications. AMSC maintains that the proposed use of Inmarsat-3 spacecraft for aeronautical and land mobile services goes far beyond ancillary use. Therefore, AMSC argues that the Commission, absent congressional action, has no authority to grant Comsat's application.

14. Arinc states that the airline industry has a worldwide demand for aeronautical satellite spectrum that exceeds even that planned by Inmarsat for its third generation system. According to Arinc, these requirements are for safety of life and airline operational services, and do not include passenger communications requirements.[14] Therefore, Arinc urges the Commission to grant Comsat's application despite its inclusion of services other than maritime.

15. Comsat states that the U.S. Government has ratified amendments to the Inmarsat Convention extending Inmarsat's scope to provision of aeronautical and land mobile communications services. Citing relevant passages from the Inmarsat Act and legislative history, Comsat further states that the Act designates Comsat as the signatory to Inmarsat for all lawful purposes. Therefore, Comsat reasons, it is not limited to the provision of maritime services via Inmarsat, as alleged by AMSC, but is the authorized entity to participate in aeronautical and land mobile Inmarsat projects as well. In any case, Comsat maintains that it may provide services ancillary to, and supportive of, Inmarsat's maritime services. Comsat argues that the Commission has already found that aeronautical services are ancillary to maritime services[15] and argues that international land mobile services are ancillary for the same reasons. Comsat further argues that international land mobile services are not an issue peculiar to the Inmarsat-3 procurement, because they will become available over the Inmarsat second generation satellites as a function of the adoption of the land mobile amendments and their ratification by the United States and other parties. Comsat also contends that the Commission has no jurisdiction over Inmarsat and cannot in any case order it to change the procurement or design of the Inmarsat-3 spacecraft. According to Comsat, the Commission can merely oversee that Comsat is making every effort to act vigorously in support of U.S. policy, which Comsat claims it has done. Comsat claims that it is obligated to fund its share of Inmarsat investment costs regardless of whether it supported or opposed any particular decision to invest.[16]

16. GMC refutes Comsat's claim that the Commission has no jurisdiction over Inmarsat and that the Commission cannot therefore stop the deployment of Inmarsat-3. GMC alleges that the Commission can assert surrogate jurisdiction over Inmarsat through its action on Comsat's application. GMC notes that the Commission has the option to disapprove the application, disallow the investment, or order a change in the methods of accounting for the expenditures. Both AMSC and GMC argue that if Commission action caused Comsat to vote against the Inmarsat-3 system, that vote would carry considerable weight, and the Inmarsat-3 satellites might be reconfigured.

17. We need not consider here the issues that AMSC and GMC raised regarding Comsat's authority to provide aeronautical or land mobile satellite services over the extended Inmarsat-3 frequencies in deciding whether under Section 504(c) of the Inmarsat Act to allow Comsat to participate in the procurement of those satellites. We find that the Inmarsat-3 system is necessary for the continuation of essential maritime satellite service. Moreover, procurement authorization is not the same as service authorization. We can grant Comsat the authority to procure these satellites at this time. Comsat will have to ask for authority to use particular additional frequencies to provide particular services, including aeronautical and land mobile services. At that time, we will address any outstanding issues that may exist as to Comsat's authority to provide these services.[17]

18. With respect to our authority over Inmarsat investments, Section 504(c) of the Inmarsat Act requires the Commission to review, evaluate and authorize Comsat's participation in Inmarsat in order to protect the public interest. Comsat therefore must apply to the Commission under Title II and Title III of the Communications Act of 1934, as amended, for authority to participate in Inmarsat programs for construction and operation of satellite systems. GMC is correct that the Commission can disapprove the application, disallow the investment, or order a change in the methods of accounting for the expenditures. However, we find that disallowance of investment or special

accounting methods are unnecessary here because under the Inmarsat Operating Agreement signatories only pay for the amount of capacity that they use.[18] If, as AMSC and GMC allege, a significant amount of the capacity of the Inmarsat-3 satellites will be used for aeronautical and land mobile services, Comsat's share of Inmarsat costs will go down unless it is authorized to provide those services. Therefore, there is no risk that ratepayers will have to support services that Inmarsat provides but that Comsat does not participate in.

C. No Need for Hearings

19. AMSC argues that Sections 303(f) and 316 of the Communications Act require a public hearing before a modification of its authorization, and that a grant of Comsat's application would so radically alter AMSC's ability to operate that it would be a modification of its authorization. GMC asserts that it has filed an application for authority to construct, launch and operate a satellite system to provide domestic MSS in the maritime satellite bands 1530-1544 MHz and 1626.5-1645.5 MHz. Further, GMC asserts that it has filed a petition for Rule Making to create a satellite system to provide domestic MSS in these maritime satellite bands.[19] GMC argues that Comsat's application is mutually exclusive with its pending application, and therefore states that the Commission must immediately accept and process GMC's application and not act on Comsat's application before giving full simultaneous consideration to GMC's application.[20] GMC further maintains that the Commission should not act in this proceeding until it has resolved the domestic policy issues in General Docket No. 90-56, because, according to GMC, Comsat said in that proceeding that the U.S. mobile satellite systems proposed there could not coexist with the Inmarsat system. Finally, GMC states that it is Commission policy that before issuing any mutually exclusive satellite authorizations, there must first be a sound technical basis for concluding that a coordination agreement can be reached. GMC says that only then can the Commission leave the coordination details to be worked out subsequently.

20. First, we note that GMC's application has been dismissed without prejudice pursuant to Section 25.112(c) of the Commission's Rules, and that dismissal has become final.[21] Therefore, there is no question of mutually exclusive applications before us here. Second, we emphasize that AMSC's license is specifically subject to international coordination.[22] Further, Section 25.111(b) of the Commission's Rules states that satellite licensees are not protected from interference by radio stations authorized by other administrations unless the coordination process is completed, and they may be subject to additional terms and conditions to affect coordination. According to Comsat, the Inmarsat proposal can be coordinated with AMSC's proposed system so as to avoid significant harmful interference, and AMSC provides no persuasive evidence that this is not the case. Therefore we conclude that even if AMSC's operations must accommodate certain terms and conditions, this is not a modification of its license, which was already subject to Section 25.111(b). Therefore, AMSC is not entitled to a hearing. Finally, in General Docket No. 90-56 we recognized that we were proposing uses that did not generally comport with the international allocation adopted at the 1987 Mobile WARC. We will proceed in that docket in the belief that within our proposal for a nonconforming, generic MSS allocation, conforming and non-conforming uses can be accommodated with the appropriate international coordination.[23] Therefore, we see no reason to delay action in this proceeding pending resolution of General Docket No. 90-56.

D. Delay Is Not in the Public Interest

21. GMC alleges that Comsat's participation in the Inmarsat-3 procurement process could be delayed without any resultant harm. GMC says that there is no urgency attached to Comsat's application, and urges the Commission to wait until frequency coordination is completed between the Inmarsat-3 satellites and domestic systems. GMC notes that the second generation Inmarsat satellites are only now being launched and the pending amendments to the Inmarsat Convention to authorize the provision of land mobile services have not even been approved yet by the requisite number of parties.[24] AMSC further points out that Comsat has not stated any immediate obligation to make a capital contribution to the Inmarsat-3 project, so its failure to make such a contribution would not result in Comsat's ejection from Inmarsat. However, AMSC clarifies that its position is not that Comsat should be forbidden to make a contribution to the Inmarsat-3 project, but only that if this application is denied and Comsat does make the contribution, any part of the investment not consistent with the Inmarsat Act should not be included in Comsat's rate base.[25]

22. AMSC has not presented any substantive reasons why delay is necessary, and it is not our policy to postpone action on applications until international coordination is complete unless there are substantial technical problems. In fact, we did not delay authorization of AMSC's domestic system pending completion of international coordination with other systems that intended to use the same bands. Moreover, the construction of the four Inmarsat-3 communications satellites must be complete in time for launch and deployment commencing in 1994/1995. There is a great demand for and use of mobile communications worldwide, and Inmarsat's new role in providing critical distress and safety communications satisfying the requirements of the GMDSS also adds to the need for adequate capacity.[26] The small, limited power Inmarsat first generation satellites are fast approaching the end of their useful life. Comsat predicts that the four Inmarsat second generation satellites will be saturated as early as 1995. The record indicates that the manufacturing process requires approximately 42 months from the time the contract is signed to the delivery of the first satellite, and the delivered satellites must then undergo thorough testing prior to launch. We have an obligation under Section 502 of the Inmarsat Act to support the development and operation of Inmarsat's global satellite maritime telecommunications system. Under these circumstances, any further delay in considering this application would not serve the public interest given the need for the Inmarsat-3 satellites to be put into operation in 1994/1995 time frame. Therefore, we will not wait for frequency coordination to be completed between the Inmarsat-3 satellites and domestic systems.

III. CONCLUSION

23. Here we must decide whether Comsat's participation in the procurement process is in the public interest, considering such factors as current spacecraft status, expected traffic growth, contingency plans in the event of satellite failure, need for new services, costs and expected revenue,

and other factors as they may be relevant. In addition, we must weigh other elements of the public interest that are not judged solely on economic or service benefits. The United States obligations under the Inmarsat agreement, the policy embodied in Section 502 of the Inmarsat Act and Section 1 of the Communications Act, as amended, and general principles of international comity are factors that cannot be quantified, but influence our decision.

24. Upon review of Comsat's application, we find Inmarsat's third generation plans to be an operationally sound approach for meeting future maritime traffic demands and maintaining acceptable maritime service at reasonable cost. We conclude that the record demonstrates the need for these spacecraft and supports the introduction of four Inmarsat-3 satellites to replace the Inmarsat-2 operational satellites in each of the four ocean regions in the 1994/1995 timeframe. Inmarsat's second generation satellites are projected to reach saturation of their capacity as early as 1995. Procurement of the third generation guarantees the ability of the Inmarsat system to respond effectively to the maritime needs of the 1990s and to meet maritime market demand into the next century. It will ensure continuity of maritime service, while maintaining reliability, redundancy, and connectivity. The increased capacity will be sufficient both for existing maritime services and for new and innovative maritime services that will benefit customers, including critical distress and safety communications satisfying the requirements of the GMDSS. The new satellites introduce much greater frequency reuse and spectrum sharing, allowing more efficient use of spectrum resources, and decreasing per-channel communications costs.

25. Finally, we conclude that the projected capital investment of approximately $700 million is reasonable considering the clear need for these facilities within the planned timeframe and in view of the benefits that will be realized in continuing and improving existing and new Inmarsat services. The United States continues to be the largest user, using almost 25 percent, of the Inmarsat system and will benefit from an improved third generation system. Comsat is authorized to expend its share of these costs amounting to approximately $175 million.

IV. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED that application File No. CSS-91-001-LA, as supplemented, IS GRANTED pursuant to Section 503(c) and (d) and 504(c)(1) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. §§ 753(c), (d), 754(c)(1), and Comsat is authorized to participate in Inmarsat's program to procure from GE Technical Services Company, Inc., as part of Inmarsat's third generation system, four spacecraft to serve the Atlantic Ocean Region-East, Atlantic Ocean Region-West, Pacific Ocean Region and Indian Ocean Region beginning in the 1994/1995 timeframe.[27]

27. IT IS FURTHER ORDERED that the petition to deny filed by AMSC IS DENIED.

28. IT IS FURTHER ORDERED that Comsat shall not participate in any substantive modification in the Inmarsat-3 construction program authorized here without prior approval from the Commission.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Subsequent to the filing of its comments, GMC was placed under the control and purview of the U.S. Bankruptcy Court for the District of Columbia as a result of it filing for protection under the bankruptcy laws of the United States. *See* Geostar Corporation, Inc., Case No. 91-00212, U.S. Bankruptcy Court for the District of Columbia. However, GMC has not withdrawn it comments, and thus we will address those issues raised by GMC.

[2] USCG says that it is responsible for safety of life at sea and for implementing the Global Maritime Distress and Safety System (GMDSS). GMDSS is the primary means for maritime distress and safety communications for ships on international voyages. USCG asserts that congestion is already being experienced with existing Inmarsat satellite capacity. It argues that the additional Inmarsat-3 capacity is vital.

[3] *See* letter from Chief, Common Carrier Bureau, to Lon C. Levin, Counsel for AMSC, dated June 25, 1992, for determination of confidentiality and disclosure issues.

[4] Spare capacity is provided by the first generation satellites.

[5] The minimum orbital operational life of the Inmarsat-3 spacecraft will be 13 years, while the minimum maneuver life in geosynchronous orbit will be ten years. The Inmarsat-2 satellites will serve as operational spares, as well as providing additional operational capacity where needed.

[6] A single spacecraft design will be implemented for all four spacecraft to meet the projected needs at any of the five identified orbital locations: 15.5° W.L., 34° W.L., 55° W.L., 64.5° E.L., and 179.5° E.L.

[7] At the time of the application, the International Table of Frequency Allocations assigned this spectrum for use on a primary basis for Space Operation (space to earth) and on a secondary basis for Earth Exploration-Satellite, Fixed, and Mobile services.

[8] The 1992 WARC approved the additional use of this band for Mobile Satellite (space-to-earth). Addendum and Corrigendum to the Final Acts of the World Administrative Radio Conference, Malaga-Torremolinos, 1992, at 7.

[9] The Commission has granted AMSC a license to construct, launch and operate the sole first generation domestic MSS system in the bands 1545-1559 MHz and 1646.5-1660.5 MHz (upper L-band). Amendment of Parts 2, 22, and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, *Memorandum, Opinion, Order and Authorization*, 4 FCC Rcd 6041 (1989) (hereinafter *Domestic Licensing Order; remanded Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991); *on remand Tentative Decision*, 6 FCC Rcd 4900 (1991); *Final Decision*, 7 FCC Rcd 266 (1992).

[10] Inmarsat first generation space segment operates in the bands 1530-1544 MHz and 1626.5-1645.5 MHz. Inmarsat second generation space segment operates in the above bands plus the additional bands 1545-1548 MHz and 1646.5-1649.5 MHz.

[11] AMSC cites Statement by the Representative of the Signatory of the United States of America submitted to 33rd Inmarsat Council Meeting (July 1989) (hereinafter U.S. Signatory Statement). The statement was made by Comsat at the instruction of the U.S. government.

[12] With respect to Inmarsat's decision to authorize an additional 5 MHz of bandwidth covering the frequency range 1525-1530 MHz in the forward direction and the corresponding 1626.5-1631.5 MHz subband in the return direction, AMSC supports the allocation, but states that MSS systems operating in the new spectrum should be required to use spot beams to maximize the opportunity to reuse frequencies among the beams and with other MSS systems. Comsat agrees to use its influence to encourage spot beam operation on the subband 1525-1530 MHz.

[13] *Provision of Aeronautical Services via the Inmarsat System*, 4 FCC Rcd 6072 (1989) (hereinafter *Inmarsat Aeronautical Order*).

[14] Arinc letter at 2, citing "a number of recent spectrum studies by the FAA, IATA, ICAO and CCIR."

[15] *Inmarsat Aeronautical Order*, 4 FCC Rcd at 6087.

[16] Comsat says that if it were to refuse to pay, U.S. representation in Inmarsat would be suspended automatically and the Council would then terminate U.S. membership in the organization.

[17] We have already made the policy determination that the public interest requires Inmarsat international aeronautical services to be made available to users in the United States. *Inmarsat Aeronautical Order*, 4 FCC Rcd at 6078 and 6087. The Common Carrier Bureau subsequently authorized Comsat and other carriers to provide such services via Inmarsat first and second generation satellite frequencies. Communications Satellite corporation, 4 FCC Rcd 7176 (1989); IDB Aeronautical Communications, Inc., 6 FCC Rcd 2485 (1991). Recently, we authorized Comsat to provide domestic aeronautical services via Inmarsat until a dedicated domestic mobile satellite system is operational. Aeronautical Radio, Inc., 7 FCC Rcd 1006 (1992). A Comsat application to provide international land mobile satellite services via Inmarsat is pending (File No. I-T-C-91-139). Thus, Comsat will need additional authority to provide any land mobile satellite service or to provide aeronautical or maritime mobile satellite service over any additional frequencies.

[18] Operating Agreement of the International Maritime Satellite Organization, Art. V and VI.

[19] The Commission adopted a Notice of Proposed Rule Making in Gen. Docket No. 90-56 incorporating GMC's petition. *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum for Mobile - Satellite Services in the 1530 - 1544 MHz* and 1626.5-1645.5 MHz B ands, 5 FCC Rcd 1255 (1990) (hereinafter *MSS Allocation Notice*).

[20] GMC cites *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 330 (1945).

[21] Letter from James R. Keegan, Chief, Domestic Facilities Division, Common Carrier Bureau, to Jones, Waldo, Holbrook, and McDonough, counsel for GMC, dated March 10, 1992.

[22] *Domestic Licensing Order*, 4 FCC Rcd at 6058.

[23] *MSS Allocation Notice*, 5 FCC Rcd at 1258.

[24] The four Inmarsat-2 satellites have since been launched and are already operational in the Indian Ocean Region, the Atlantic Ocean Region-East, and the Pacific Ocean Region.

[25] As already noted, disallowance is inappropriate in this case because Comsat will only pay for the amount of capacity that it uses.

[26] The USCG states that congestion is already being experienced with existing Inmarsat capacity, and that additional capacity is vital for the introduction and successful operation of GMDSS.

[27] Action on this application to grant authority to participate in Inmarsat's program to procure four third generation spacecraft is without prejudice to any future Commission action regarding the use of any additional frequency bands. This authorization does not preclude the United States from using any of the frequencies at issue in this proceeding for its domestic requirements. Nor does it prejudge any of the issues presented in File No. I-T-C-91-139, in which Comsat has requested blanket authority to provide international land mobile satellite services via the Inmarsat system outside of North America (United States, Canada, and Mexico).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

License Renewal Applications of
Certain Broadcast Stations
Licensed to Communities in
Maryland, Virginia, West Virginia,
and the District of Columbia

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 1992; Released: September 25, 1992

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it for consideration informal objections, filed by Lindsay Television, Inc. (Lindsay), against grant of the 1991 renewal applications of 47 television stations licensed to communities in Maryland, Virginia, West Virginia and the District of Columbia.[1] The objections, which are identical, were filed on October 30, 1991. The licensees of 27 of the 47 stations filed oppositions, requesting that the Commission dismiss or deny the objections.[2]

2. Lindsay contends that before we grant the renewal applications, each of the licensees must demonstrate that its television operation causes no harmful interference to the activities of the National Radio Astronomy Observatory (NRAO) at Green Bank, West Virginia. This showing is required, according to Lindsay, because in its own comparative proceeding for a new station on Channel 64 in Charlottesville, Virginia, Lindsay was required to provide, even though its transmitter site was outside of the "Quiet Zone,"[3] a threshold interference level of protection not to exceed 1 x 10 to the -17 watts per meter squared. *Achernar Broadcasting Company*, 5 F.C.C. Rcd 962, 963 (ALJ 1990), *rev'd* 5 F.C.C. Rcd 6309 (Rev. Bd. 1990), *rev'd* , 6 F.C.C. Rcd 5393 (1991), *recon. denied*, 7 F.C.C. Rcd 1778 (1992), *appeal pending sub nom., Lindsay Television, Inc. v. F.C.C.*, No. 92-1149 (D.C. Cir. filed April 16, 1992). Consequently, Lindsay argues, the holding of *Melody Music, Inc. v. F.C.C.*, 345 F.2d 730 (D.C. Cir. 1965), mandates that the "similarly-situated" renewal applicants also must demonstrate that their operations do not cause harmful interference to the NRAO prior to Commission determination that grant of the renewal applications is in the public interest.

DISCUSSION

3. Section 73.3587 of the Commission's Rules provides that any party may file an informal objection prior to Commission action on an application. Accordingly, we have determined that the objections to the renewal applications of 18 of 47 television stations in Maryland, Virginia, West Virginia and the District of Columbia were timely filed since we have not yet acted on those applications. However, because we already had granted the renewal applications of the 29 other television stations prior to receipt of the informal objections, we have determined that the objections to those stations were not timely filed. Notwithstanding the lateness of those filings, we believe that the public interest would be served by treating the objections to the renewal of the licenses of those 29 stations as informal requests for reconsideration of our grant of those renewal applications. *See Triangle Publications, Inc.*, 27 F.C.C. 2d 1019, 1020 (1971). In so doing, we do not suggest that Lindsay has established, pursuant to Section 405 of the Communications Act or Section 1.106(b)(1) of the Commission's Rules, that it is a party aggrieved or whose interests have been adversely affected by the staff's action. *Id.* Whether we consider the filings as informal objections or as informal requests for reconsideration of our grant of renewal, the pleadings must contain adequate and specific factual allegations sufficient to warrant the relief requested. *Area Christian Television, Inc.*, 60 R. R. 2d 862, 864 (1986).

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[1] The stations in Maryland are: WBAL-TV, Channel 11, Baltimore; WBFF, Channel 45, Baltimore; WBOC-TV, Channel 16, Salisbury; WHAG-TV, Channel 25, Hagerstown; WHSW, Channel 24, Baltimore; WJAL, Channel 68, Hagerstown; WJZ-TV, Channel 13, Baltimore; WMAR-TV, Channel 2, Baltimore; WMDT, Channel 47, Salisbury; and WNUV-TV, Channel 54, Baltimore.

The stations in Virginia are: WAVY-TV, Channel 10, Portsmouth; WCYB-TV, Channel 5, Bristol; WDBJ, Channel 7, Roanoke; WEFC, Channel 38, Roanoke; WGNT, Channel 27, Portsmouth; WHSV-TV, Channel 3, Harrisonburg; WJCB, Channel 49, Norfolk; WJPR, Channel 21, Lynchburg; WRLH-TV, Channel 35, Richmond; WSET-TV, Channel 13, Lynchburg; WSLS-TV, Channel 10, Roanoke; WTKK, Channel 66, Manassas; WTKR-TV, Channel 3, Norfolk; WTVR-TV, Channel 6, Richmond; WTVZ-TV, Channel 33, Norfolk; WVEC-TV, Channel 13, Hampton; WVFT, Channel 27, Roanoke; WVIR-TV, Channel 29, Charlottesville; WWBT, Channel 12, Richmond; and WZXK, Channel 65, Ashland.

The stations in West Virginia are: WBOY-TV, Channel 12, Clarksburg; WCHS-TV, Channel 8, Charleston; WDTV, Channel 5, Weston; WLYJ, Channel 46, Clarksburg; WOAY-TV, Channel 4, Oak Hill; WOWK-TV, Channel 13, Huntington; WSAZ-TV, Channel 3, Huntington; WTAP-TV, Channel 15, Parkersburg; WTRF-TV, Channel 7, Wheeling; WVAH-TV, Channel 11, Charleston; and WVVA, Channel 6, Bluefield.

The stations in the District of Columbia are: WDCA-TV, Channel 20; WFTY, Channel 50; WJLA-TV, Channel 7; WRC-TV, Channel 4; WTTG, Channel 5; and WUSA, Channel 9.

[2] Those stations are: WAVY-TV, WBAL-TV, WCYB-TV, WDBJ, WDCA-TV, WGNT, WHAG-TV, WHSV-TV, WHSW, WJLA-TV, WJPR, WJZ-TV, WRC-TV, WRLH-TV, WSAZ-TV, WSET-TV, WTAP-TV, WTKK, WTKR-TV, WTRF-TV, WTTG, WTVR-TV, WVAH-TV, WVEC-TV, WVFT, WWBT, and WZXK.

[3] The National Radio Quiet Zone (Quiet Zone) is a fixed 13,000-square mile area of Virginia and West Virginia surrounding the NRAO at Green Bank, West Virginia. The area was established by the Commission in 1958 to protect the activities of the NRAO from harmful interference.

Requirement of a noninterference showing

4. Section 73.1030(a) of the Commission's Rules requires that an applicant for authority to construct a new broadcast station or for authority to make changes in the frequency, power, antenna height, or antenna directivity of an existing station within the Quiet Zone must notify the NRAO in writing of its proposal simultaneously with the filing of its application with the Commission. If the NRAO objects to the proposed operation during the subsequent 20-day comment period, the Commission will consider all aspects of the problem and take whatever action is deemed appropriate. This notification requirement indicates that the Commission believes that the threat of interference to the NRAO from new stations within the Quiet Zone "is of such pressing concern as to warrant imposition of a special notification requirement that might be unduly burdensome if imposed beyond the Zone." *Achernar*, 6 F.C.C. Rcd at 5394. However, although applicants proposing facilities outside the Quiet Zone are not subject to the requirement notice of Section 73.1030(a), "[n]othing in the rule precludes someone who believes that the public interest would be disserved for similar reasons by the grant of an application *for a site outside of the Zone* from raising the issue" in a petition to deny or an informal objection. *Id.* (emphasis added). Indeed, in Lindsay's comparative proceeding it was the competing applicant which submitted an engineering exhibit demonstrating that Lindsay's proposed transmitter site, although outside the Quiet Zone, would create substantial interference to the activities of the NRAO. *Achernar*, 5 F.C.C. Rcd at 962. And even though the NRAO did not initially object to Lindsay's proposed facility, the Commission required Lindsay to demonstrate public interest factors that might offset any potential interference to the NRAO. *Achernar Broadcasting Company*, 6 F.C.C. Rcd 1748, 1749 (1991).

5. The Commission's policy regarding the NRAO is to provide it maximum practicable protection, without "unduly disrupting *existing* radio services." *Interference Protection to Frequencies Utilized for Radio Astronomy*, 17 R.R. 1738, 1739 (1958) (emphasis added). In fact, the NRAO has never objected to the continued operation of any existing station. *See Achernar*, 6 F.C.C. Rcd at 5395. If, however, such an objection were raised, the Commission has stated that it "will consider it in light of all relevant facts and circumstances." *Id.*

6. In the instant proceeding, Lindsay asserts, referring to the NRAO power density level for Channel 64 in Charlottesville, that "this exceedingly high level of protection has got to be violated" by the 47 renewal applicants. Lindsay submits no engineering evidence to support its assertion and its only support for this conclusion is testimony given during the comparative hearing by the associate director for the NRAO, who stated that the NRAO has sustained an unspecified level of broadcast station interference from a station as far south as Florida and a station as far north as Pennsylvania. *Achernar*, 5 F.C.C. Rcd at 966-67. Accordingly, Lindsay contends, the renewal applicants must now demonstrate their stations' lack of interference with NRAO activities, as was required of Lindsay in its comparative proceeding.

7. In view of Lindsay's unsupported allegations, we find that it has relied upon general, conclusory assertions rather than setting forth specific factual allegations which would warrant grant of the relief requested. Consequently, Lindsay has failed to meet the burden of pleading required of even an informal objector, *see, e.g., WFBM, Inc.*, 47 F.C.C. 2d 1267, 1268 (1974), and the renewal applicants are not required to demonstrate either a lack of interference to the NRAO or offsetting public interest factors. Moreover, in view of Lindsay's failure to demonstrate interference, as well as the absence of an objection by the NRAO, we believe that the broadcast operations of the renewal applicants co-exist with the NRAO's radio astronomy activities without the detrimental effect which would have been created by Lindsay's facility, as discussed below.

Applicability of Melody Music

8. Relying on *Melody Music*, 345 F.2d at 730, Lindsay contends that *Achernar* established a mandatory noninterference showing of all applicants, including those for renewal, in the geographic area of Green Bank, West Virginia. We disagree. *Melody Music* and its progeny established the standard that the Commission must treat similarly situated parties alike unless it explains its reasons for differential treatment in light of the purposes of the Communications Act. We find that Lindsay in its comparative proceeding for a new station on Channel 64 in Charlottesville and the renewal applicants here are not similarly situated for several reasons. First, the evidence submitted against Lindsay in its comparative proceeding and the information submitted against the renewal applicants here are vastly dissimilar. While the competing applicant in Lindsay's comparative hearing presented persuasive and specific engineering evidence of Lindsay's potential interference to NRAO activities, Lindsay has submitted only conclusory statements and conjecture in support of its objections to the renewal applications. The potential interference to the NRAO created by Lindsay's proposed facility was determined by conditions specific to Lindsay's frequency assignment, transmitter location, antenna height, effective radiated power, and power input to the NRAO antennas. *Achernar*, 5 F.C.C. Rcd at 963. Those factors, according to an NRAO technical expert, yielded a power density level that would have exceeded the NRAO limitation, which, for Channel 64, is 1 x 10 to the -17 watts per meter squared, by a multiplication factor of 20,000.[4] *Id.* Consequently, according to the NRAO, Lindsay's proposed facility would have rendered unusable to the NRAO the entire 6 MHz bandwidth of Channel 64, in addition to 2 MHz in adjacent frequencies. *Id.* Lindsay alleges no similar conditions, resulting power density levels or frequency use preclusion with regard to the renewal applicants before us. Moreover, the NRAO has never objected to interference from an existing station, *Achernar*, 6 F.C.C. Rcd at 5395, and it does not object to any of the renewal applicants before us, as it did to Lindsay's application. Finally, the Commission denied Lindsay's application not because of

[4] The power density limits were established by taking into consideration demonstrable receiver sensitivities and standards for antenna sidelobe responses, the proximity of the transmitter's radio frequency to a protected radio astronomy band, and existing interference conditions over which the Quiet Zone has no control, such as the radiation propagated into the Quiet Zone by the ionosphere. *See Achernar*, 3 F.C.C. Rcd 5421, 5427 (ALJ 1988).

the potential interference to the NRAO, but because Lindsay failed to persuade the Commission that granting its application would serve the public interest despite the detrimental effect that application would have on the NRAO. *Achernar*, 7 F.C.C. Rcd at 1778. Here, because Lindsay has failed to meet even the threshold showing of interference by the renewal applicants to the NRAO, we need not request of these applicants, nor balance, any offsetting public interest factors as required of Lindsay in its comparative proceeding.

9. For the reasons stated above, we find that Lindsay Television, Inc. has failed to set forth specific facts which, if true, would establish that a grant of the renewal applications for the 47 television stations noted above would be *prima facie* inconsistent with the public interest, convenience and necessity. *See, e.g., Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

10. Accordingly, IT IS ORDERED, That the Informal Objections filed by Lindsay Television, Inc. against the license renewal applications of 47 television stations located in Maryland, Virginia, West Virginia and the District of Columbia, considered as informal objections against 18 of the applications and as informal requests for reconsideration against 29 of the applications, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMPUTER POWER, INC. NAL No. 216SR0001NAL

Notice of Apparent Liability for
Forfeiture for VSAT Network
Call Signs E873409, E873410 and
E873411

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

ORDER

Adopted: September 18, 1992; Released: September 24, 1992

By the Chief, Domestic Facilities Division:

1. On February 21, 1992, the Domestic Facilities Division issued a Notice of Apparent Liability (NAL) for Forfeiture to Computer Power, Inc. (CPI), finding that CPI had repeatedly operated additional earth stations associated with its referenced VSAT network on an unlicensed basis in apparent violation of Section 301 of the Communications Act, 47 C.F.R. § 301. CPI was assessed a forfeiture for this apparent violation in the amount of $1600.00. CPI was directed to submit payment in full or to file a response showing why the monetary forfeiture should not be imposed or should be reduced.

2. To date, CPI has taken no action in response to the NAF, and the $1600.00 forfeiture has remained unpaid. Therefore, CPI is ordered to pay $1600.00.

ORDERING CLAUSES

3. Accordingly, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, IT IS ORDERED that Computer Power, Inc. FORFEIT to the United States the sum of Sixteen Hundred Dollars ($1600.00) for the violation of Section 301 of the Communications Act. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of release of this Order to: Federal Communications Commission, P.O. Box 73482, Chicago, IL 60673-7482.

4. IT IS FURTHER ORDERED that if the forfeiture payment is not made within thirty days, the case may be referred to the Department of Justice for collection, pursuant to Section 504(a) of the Communications Act, 47 C.F.R. § 504(a).

5. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Computer Power, Inc. by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Cheryl A. Tritt
Chief, Common Carrier Bureau

MM Docket No. 91-226

In the Matter of

NYNEX Telephone Companies

Revisions to Transmittal No. 108
Tariff F.C.C. No. 1

ORDER

Adopted: September 11, 1992; Released: September 14, 1992

By the Chief, Common Carrier Bureau:

1. On August 4, 1992, the NYNEX Telephone Companies (NYNEX) filed Transmittal No. 108 to revise rates for its Fiber Based Channel Terminations (FBCT) in the Voice Grade Service and Digipath Digital Service II (DDS II) sections of NYNEX Tariff F.C.C. No. 1. Transmittal 108 is scheduled to become effective on September 15, 1992. No parties opposed these revisions.

2. On August 2, 1991, the Bureau released an Order initiating an investigation of the new service rates for FBCT.[1] Transmittal 108 raises the same issues as those transmittals subject to our *Investigation Order*. Therefore, the instant transmittal will be subject to the outcome of that investigation.

3. Accordingly, IT IS ORDERED that, pursuant to Sections 204(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 204(a), 403, NYNEX Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 108 is subject to the investigation instituted in CC Docket No. 91-226.

4. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the instant tariff revisions filed by the NYNEX Telephone Companies ARE SUSPENDED for one day.

5. IT IS FURTHER ORDERED that the NYNEX Telephone Companies SHALL FILE a supplement to the tariff reflecting this suspension. Special Permission No. 92-621 is assigned for this purpose.

6. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the NYNEX Telephone Companies shall keep accurate account of all amounts received pursuant to the rates which are the subject of this investigation.

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[1] NYNEX Telephone Companies, Tariff F.C.C. No. 1, Transmittal Nos. 3 and 39, Order, CC Docket 91-226, 6 FCC Rcd 4841 (Com.Car.Bur. 1991) (*Investigation Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 11, 1992

AT&T SEEKS WAIVER OF PRICE CAP RULES FOR ITS COMMERCIAL LONG DISTANCE SERVICE

Pleading Cycle Established

COMMENTS: October 13, 1992
REPLY COMMENTS: October 27, 1992

On September 1, 1992, AT&T filed a petition for waiver of the Commission's price cap regulations for its new Commercial Long Distance Service. AT&T states that due to the pervasive competition for Commercial Long Distance Service, continued price cap regulation of this new service would not serve the public interest. AT&T cites developments such as the financial strength of its competitors, the absence of barriers to entry and the decline in AT&T's market share over time as evidence that this service should receive streamlined treatment.

AT&T states that there is good cause for its waiver because the regulations governing Commercial Long Distance Service do not serve the public interest, and that the waiver would not undermine the public policies that the regulation is intended to serve.

Interested parties may file comments regarding this petition no later than October 13, 1992. Reply comments may be filed no later than October 27, 1992.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with Downtown Copy Center, the Commission's duplicating contractor, at its office in Suite 640, 1990 M Street, N.W., Washington, D.C. 20554, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda Harris or Nancy Boocker, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 4406
Tariff F.C.C. No. 1

ORDER

Adopted: September 14, 1992; Released: September 14, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On September 1, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective September 15, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces a promotion for AT&T Commercial Long Distance Service.

2. On September 8, 1992, MCI Telecommunications Corporation (MCI) filed a petition to suspend Transmittal No. 4406.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4406 and MCI's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 4406, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 17, 1992

PLEADING CYCLE ESTABLISHED FOR AD HOC'S PETITION FOR EXPEDITED DECLARATORY RULING REGARDING ISSUES ASSOCIATED WITH IMPLEMENTATION OF 800 DATA BASE SYSTEM

CC Docket No. 86-10

On September 2, 1992, Ad Hoc Telecommunications Users Committee (Ad Hoc) filed a petition for expedited declaratory ruling on issues associated with the implementation of 800 data base service. Ad Hoc asks the Commission to rule that local exchange carriers (LECs) that are required to participate in 800 data base not use 800 data base technology to route 800 service traffic to 800 service providers during the transition to number portability if the access times for such traffic would exceed the Commission's revised access times. Ad Hoc also asks the Commission to "advise" the LECs that data base routing of 800 service traffic during the fourth quarter of this year seems not to be necessary and presents unnecessary risks.

Ad Hoc is concerned that the transition to number portability could adversely impact access times for 800 data base service. It claims that some LECs are apparently planning to implement six-digit data base routing of 800 service traffic from LEC offices that are not equipped with Signalling System 7 (SS7) technology and that would not interconnect to long distance carriers on an SS7 basis. This, it argues, would in most instances produce access times in excess of what the Commission has authorized. Ad Hoc further argues that while such an implementation arrangement would be damaging and objectionable if it were to occur at any time during the year, it would be particularly troublesome during the fourth quarter of a calendar year when 800 service disruptions or degradation of 800 service would have potentially acute consequences to the profitability of important sectors of the economy. Ad Hoc states that granting its petition would be in the public interest since it would reduce the risks of 800 data base service degradation or disruption during the fourth quarter of the year.

Interested parties should file comments on the petition by October 1, 1992, and reply comments by October 8, 1992, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Marian R. Gordon, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the petition can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. Sections 1.1200-1.1216. For further information, contact Gary Phillips or Marian Gordon, Policy and Program Planning Division, Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 10, 1992

Released: September 25, 1992

CERTIFIED MAIL NO. P 897 383 280
RETURN RECEIPT REQUESTED

Richard Hildreth, Esq.
Fletcher, Heald
& Hildreth
Attorneys at Law
Suite 400
1225 Connecticut Avenue, N.W.
Washington, D.C. 20036-2679

Re: Notice of Forfeiture
issued to KSTC, licensee of KNNG,
on January 24, 1992.
3153402-92008
DV-92-054

Dear Mr. Hildreth:

This is in response to your Petition for Reconsideration and supplement in which you requested reconsideration of a $4,500 monetary forfeiture penalty that had been assessed by the FCC's Denver Office against KSTC, Inc., Ogallala, NE, for FCC rule violations involving KNNG (FM), Sterling, Colorado.

We are treating your request as a Petition for Reconsideration under Section 1.106 of the FCC's rules, 47 C.F.R. Section 1.106. As explained below, we are canceling $1,000 of the monetary forfeiture penalty, and reducing the remaining $3,500 penalty to $2,800.

Our records show that on September 26, 1991, an FCC inspector visited radio station KNNG (FM) in Sterling, Colorado. The licensee of KNNG (FM) is KSTC, Inc., Ogallala, Nebraska. The FCC inspector could not find entries in the station log for Emergency Broadcast System (EBS) tests received during the last three months, and for EBS tests transmitted for six weeks. Also, two items required in the public inspection file could not be located, namely, the most recent ownership report and a manual named THE PUBLIC AND BROADCASTING - A PROCEDURAL MANUAL.

On October 22, 1991, the FCC's Denver Office issued an Official Notice of Violation (FCC Form 793) to KSTC, Inc. The Notice stated that KNNG (FM) violated Section 73.1820(a)(1)(iii) of the FCC's rules, 47 C.F.R. Section 73.1820(a)(iii) (requires an entry of each EBS test in the station log). The Notice also said that Section 73.3526(a) of the rules had been violated, 47 C.F.R. Section 73.3526(a) (requires a station's local public inspection file to contain ownership reports and a manual entitled THE PUBLIC AND BROADCASTING - A PROCEDURAL MANUAL). KSTC, Inc. replied to this Notice in an undated letter.

On November 19, 1991, the FCC's Denver Office issued KSTC, Inc. a Notice of Apparent Liability for violating the above rules. KSTC, Inc. provided a four page, undated response. On January 24, 1992, the FCC's Denver Office issued a Notice of Forfeiture for a $4,500 monetary forfeiture penalty to KSTC, Inc. for the rule violations.

After reviewing the forfeiture case in response to KSTC's Petition for Reconsideration, we are not imposing a monetary forfeiture penalty for KNNG's apparent failure to have a manual, THE PUBLIC AND BROADCASTING - A PROCEDURAL MANUAL, in its public inspection file. Although Section 73.3526(a)(6) of the FCC's rules requires this manual to be in the file, the manual was published in 1974 and contains some information that is out-of-date. 47 C.F.R. Section 73.3526(a)(6). The amount of the monetary forfeiture penalty imposed for this and another violation of Section 73.3526 was $2,000. Therefore, half of this forfeiture or $1,000 is canceled.

Furthermore, the FCC's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695, 69 RR2d 823 (1991), *modified on reconsideration*, FCC 92-212 (May 14, 1992), specifies certain factors that the FCC may consider as "downward adjustment criteria" to reduce monetary forfeiture penalties. Taking these factors into consideration, especially the unrebutted assertion regarding a history of compliance with the FCC's rules, the penalty is reduced from $3,500 to $2,800.

KSTC in its Petition for Reconsideration presents a number of reasons why the remaining $2,800 in monetary forfeiture penalties should be canceled. Regarding the other violation of Section 73.3526, namely, the failure to have the station's most recent ownership report in the public inspection file, KSTC states in its reply to the Official Notice of Violation:

> Most recent ownership report missing: it was there, dated May of 1990. The 1991 report was filed with the Commission as no change from last report. I am sending another copy of that certification to be placed in the file.

Section 73.3615(a) of the FCC's rules requires that an ownership report or a certification that there has been no change in ownership be filed once a year. 47 C.F.R. Section 73.3615(a). Furthermore, a copy of ownership reports and "related material filed pursuant to this section" are required to be kept in the public inspection file. 47 C.F.R. Section 73.3615(g). KSTC's reply to the Notice of Violation was interpreted by the FCC's Denver Office as admitting that a certification for 1991 that there had been no change in ownership was not in the public inspection file, and this appears to be a reasonable interpretation of KSTC's statement. However, KSTC in its subsequent response to the Notice of Apparent Liability explains:

> ...The inspector was shown the ownership information in the file but apparently his concern was that the certification which stated that there had been no changes in ownership was not with the regular ownership material. It was, however, in the station's public file.
>
> ...In other words, the public file of KNNG(FM) was complete and was made available to the inspector. The fact that specific documents could not be immediately produced does not render the file incomplete.

The FCC inspector looked in KNNG's public inspection file for a 1991 ownership report (FCC Form 323) or a statement certifying that there had been no ownership changes since the 1990 report that had been submitted for 1991, and could not find it. The FCC inspector then asked the station manager to locate this document and he also could not find it.

Section 73.1226 of the FCC's rules requires station records and logs to "be made available to any authorized representative of the FCC upon request." 47 C.F.R. Section 73.1226. *See also* 47 C.F.R. Section 73.1225. The public inspection file in general and its contents, including ownership reports, are considered "records." *E.g.*, 47 C.F.R. Section 73.3526(a), (d) and (e). These provisions have been interpreted to mean that a broadcast station must have the public inspection file "available for immediate inspection." *Thomas P. Brunnock, Esq.*, 50 RR2d 1313, 1314a (1982). To merely produce a file, as KNNG did, or a mass of records and say that a requested individual record is contained somewhere in the file without actually producing the distinct record, does not meet the requirement of the FCC's rules. If a requested record cannot be identified and produced during an FCC inspection, the FCC must assume that the record does not exist.

With regard to the violation of Section 73.1820(a)(1)(iii) of the FCC's rules for failure to log EBS tests received for three months and EBS tests sent for six weeks, KSTC provided evidence to the FCC's Denver Office that it had logged the tests that it had transmitted for the six weeks in question. The Denver Office, however, responded in the Notice of Forfeiture that "Although you provide substantial evidence that KNNG did log transmitted EBS tests, you provide no evidence that suggests EBS tests received were appropriately associated with the station log." Thus, the FCC's Denver Office continued to maintain that the FCC rule was violated because there were no logs reflecting EBS tests received by the station for the three months prior to the inspection. KSTC explains in its Petition for Reconsideration that:

> [T]he stations maintain track of the EBS tests on their program logs. The information on the program log is also written into a separate log book. Additionally, EBS tests received ... are recorded by the "National Supervisory Network" ... which is paid by KSTC ... to maintain a separate monitoring ... . Thus, there are *three* occasions when the EBS tests are logged.
>
> . . . .
>
> [T]he inspector chose not to look at the station program log which apparently led him to issue the Notice of Violation ... . Copies of the relevant program logs are attached ... showing the logging of the EBS tests. Further, the provision in the rules which permit stations to keep EBS test data at "any convenient location" was referenced as was the fact that the log-keeping method ... satisfied the Commission's requirements.

KSTC provided copies of its EBS transmission logs. In addition, KSTC provided copies of The National Supervisory Network logs for the receipt of EBS tests in its "Supplement to Petition For Reconsideration." KSTC further states in its undated response to the Notice of Apparent Liability:

> The logging performed by NSN is simply a part of its regular service and these logs are reviewed at Ogallala by our corporate Chief Engineer before being sent on to KNNG(FM) at Sterling.
>
> The section of the Rules referring to the logging of EBS tests does not require that they be kept in any particular form or in any particular place. The Rules specifically state "all stations may keep EBS test data in a special EBS log which will be maintained at any convenient location." ...[T]he rules do not require, as you state, that the EBS logs must be "on site" but rather, "at any convenient location." ...[T]he information was logged and was present and available to the inspector. He chose not to inspect the logs containing this information ... .

As occurred regarding the ownership report, when the FCC inspector reviewed the §station log, and could not find entries reflecting the receipt and transmission of certain EBS tests, he asked the station manager to produce the missing logs. The station manager could not locate them. This occurred early during the FCC's inspection which lasted about four hours. During this period, the missing logs were not produced. Months after the inspection, KSTC provided EBS logs.

Section 73.961 of the FCC's rules requires entries in the station log for EBS tests received and transmitted. 47 C.F.R. Section 73.961. *See also* 47 C.F.R. Section 73.1820(a)(1)(iii), and *Chesapeake Broadcasting Corp.*, 62 RR2d 1524, 1525-26 (1987). Stations are required to make available to FCC inspectors station logs "upon request." 47 C.F.R. Section 73.1225(c)(5). Similar provisions in the FCC's rules have been interpreted to mean that records must be made "available for immediate inspection." *Thomas P. Brunnock, Esq.*, 50 RR2d at 1314a. During the FCC's inspection of the station, logs reflecting the receipt and transmission of certain EBS tests were not produced. Thus, the FCC's rules were violated.

KSTC appears to argue that some EBS records for station KNNG in Sterling, Colorado, were located at KSTC's corporate headquarters in Ogallala, Nebraska, and that Section 73.1820(a)(1)(iii) of the FCC's rules allows EBS logs to "be maintained at any convenient location." However, the same sentence in the FCC's rules further provides that "such log should be considered a part of the station log." As explained above, the FCC's rules require the station log to be made available to an FCC inspector "upon request." The statement that EBS logs may be kept at any convenient location, therefore, should not be read to exempt stations from producing these logs at the station when requested.

A possible purpose of the "convenient location" provision may be to distinguish the EBS logging rule, Section 73.1820(a)(1)(iii), from the FCC rule relating to the EBS checklist (the checklist summarizes actions to be taken by station personnel in response to EBS messages). Section 73.908 of the FCC's rules requires the EBS checklist to "be located at normal duty positions" of "broadcast station staff responsible for ... EBS actions" whereas the EBS log may be kept at "any convenient location" as part of the station log. 47 C.F.R. Section 73.908.

KSTC claims that the monetary forfeiture penalties are too high, "totally inappropriate" and "might be appropriate for criminal activity such as assault and battery." The penalties are within the limits authorized by Section 503(b)(2) of the Communications Act of 1934, 47 U.S.C. Section 503(b)(2). Furthermore, the penalties do not exceed the amounts provided in the FCC's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695, 69 RR2d 823 (1991), *modified on reconsideration*, FCC 92-212 (May 14, 1992). The *Policy Statement* recommends a $7,500 monetary forfeiture penalty for a violation of the public file rules. A lower penalty, namely, $1,000, was imposed for the failure to have the most recent ownership report in the public inspection file since this was the only document missing from the file. The *Policy Statement* recommends a $2,500 monetary forfeiture penalty for a "failure to maintain required records," and this was the penalty imposed for the missing EBS logs. However, as previously discussed, the total penalty of $3,500 is reduced to $2,800 based on the FCC's discretion to apply the downward adjustment criteria in the *Policy Statement*.

KSTC also complains that "There was no prior advisory that an inspection was to be made." However, the FCC is not required to notify licensees in advance regarding the FCC's policies for enforcing its rules. *High Country Broadcasting Corporation*, 4 FCC Rcd 1528, 65 RR2d 1618 (1988).

Finally, KSTC states that in its area of operation "the economy is severely depressed" and "That broadcasting stations throughout the country have been suffering ...." Section 503(b)(2) of the Communications Act of 1934 directs the FCC to consider ability to pay when imposing monetary forfeiture penalties. If there is a serious problem in paying the penalty, the FCC needs supporting documentation. This documentation usually takes the form of income tax returns. Therefore, if you wish to claim inability to pay, please provide the FCC with copies of KSTC's Federal Income Tax returns or similar documentation for the last three years.

Please submit either this documentation or the $2,800 monetary forfeiture payment within 30 days. Please submit the forfeiture payment by check or money order payable to the Federal Communications Commission. Please place the number 3153402-92008 on the check. The forfeiture payment should be sent to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If you wish to submit tax returns or similar documentation to support a claim of inability to pay, please send them to:

Federal Communications Commission
Higher Level Review, Enforcement Division
Field Operations Bureau
1919 M Street, N.W., Room 744
Washington, D.C. 20554

If the forfeiture is not paid by the specified time, the forfeiture case will be referred to the U.S. Attorney for collection through a civil suit. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 10, 1992

Released: September 25, 1992

CERTIFIED MAIL NO. P 636 841 009
RETURN RECEIPT REQUESTED

McCoy Broadcasting Company
4700 S.W. Macadam
Portland, Oregon 97201

Re: Notice of Forfeiture
issued to McCoy Broadcasting Co.,
licensee of KCCY (FM)
on February 12, 1992.
3153402-92022

Attention: Mr. Craig W. McCoy
President

Dear McCoy Broadcasting Company:

This is in response to your request for review dated March 10, 1992, submitted to the Federal Communications Commission (FCC). You requested review of a $4,750 monetary forfeiture penalty that had been assessed by the FCC's Denver Office against McCoy Broadcasting Company (McCoy) for FCC rule violations involving broadcast station KCCY (FM), Pueblo, Colorado.

We are treating your request as a Petition for Reconsideration under Section 1.106 of the FCC's rules, 47 C.F.R. Section 1.106. As explained below, we are reducing the $4,750 monetary forfeiture penalty to $4,000, and we are affirming this penalty.

Our records show that on December 5, 1991, an FCC inspector visited radio station KCCY. McCoy is the licensee of this station. The FCC inspector observed that KCCY had not conducted weekly tests of the Emergency Broadcast System (EBS) for the weeks of October 13, October 27 and November 3, 1991. The station log, moreover, did not reflect EBS tests received for the weeks of September 1, 8, and 15; and October 20, 1991. Also, the local public inspection file did not contain ownership reports for 1988 through 1991. On December 27, 1991, the FCC's Denver Office received from McCoy a copy of an ownership report dated October 1, 1991.

On January 9, 1992, the FCC's Denver Office issued McCoy a Notice of Apparent Liability. The Notice stated that KCCY had repeatedly violated Sections 73.961(c), 73.1820(a)(1)(iii) and 73.3526(a) of the FCC's rules, 47 C.F.R. Sections 73.961(c)(requires weekly transmission of EBS tests), 73.1820(a)(1)(iii) (requires EBS tests to be recorded in the station log), and 73.3526(a) (requires a station's local public inspection file to contain a copy of every ownership report and related material). McCoy responded to the Notice in a letter dated January 24, 1992.

On February 12, 1992, the FCC's Denver Office issued a Notice of Forfeiture to McCoy for a $4,750 monetary forfeiture penalty. This included a $1,250 penalty for violating Section 73.961(c), a $2,500 penalty for violating Section 73.1820(a)(1)(iii), and a $1,000 penalty for violating Section 73.3526(a). The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act of 1934, 47 U.S.C. Section 503(b).

The $4,750 monetary forfeiture penalty is reduced to $4,000. The FCC's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695, 69 RR2d 823 (1991), *modified in part on reconsideration*, FCC 92-212 (May 14, 1992) (hereinafter cited as *Policy Statement*), specifies certain factors that the FCC may consider as "downward adjustment criteria" to reduce monetary forfeiture penalties. Taking these factors into consideration, especially lack of evidence concerning past noncompliance with the FCC's rules, the penalty is reduced to $4,000.

McCoy appears to agree with the observations of the FCC inspector regarding deficiencies at KCCY, but states mitigating factors why the "fine should be waived or substantially reduced." McCoy explains that the failure to conduct and log EBS tests was because a station employee "neglected to do so" or "simply failed to perform his duty" and because of "equipment failure ... that was not detected until after the fact," but has been remedied by new procedures such as the routine inspection of EBS equipment. However, "Employee acts or omissions, such as clerical errors ... do not excuse violations." *Standard Communications Corporation*, 1 FCC Rcd 358 (1986).

Regarding the failure to have ownership reports in the public inspection file, McCoy states:

> ... The Public File was lacking the most recent ownership report, which had been timely filed with the Federal Communications Commission ... . A copy of the ownership report was returned [by KCCY] to McCoy Broadcasting Company absent one of the pages. When I informed counsel of the deficiency, he had to check with the FCC to make sure that a complete copy had been filed. When it was determined that our filing was complete and accurate, new copies were sent to ... the KCCY Public File - but those copies did not reach their destination until after your inspection of KCCY's facilities.

It was not just the most recent ownership report for 1991 that was missing from KCCY's public inspection file, but the ownership reports for 1988, 1989 and 1990. The Notice of Apparent Liability issued to McCoy specified that the public inspection file was missing "The most recent ownership reports " (emphasis added), and that "The latest ownership report in the file was dated August 3, 1987."

Section 73.3615(a) of the FCC's rules requires that an ownership report or a certification that there has been no change in ownership be filed once a year. 47 C.F.R. Section 73.3615(a). Furthermore, a copy of "all" ownership reports and related material are required to be kept in the public inspection file. 47 C.F.R. Section 73.3615(g) and 73.3526(a)(3). McCoy failed to comply with this requirement for at least three years.

McCoy also argues that the penalty should be waived since it took prompt corrective action. Remedial action to correct a violation, although commendable, does not nul-

lify a monetary forfeiture penalty. *E.g., Station KGVL, Inc.*, 42 FCC2d 258, 259 (1973); *Executive Broadcasting Corp.*, 3 FCC2d 699, 700 (1966).

McCoy further claims that it is "inappropriate ... for your Field Offices to impose such harsh fines for relatively minor deficiencies ... ." Repeated violations involving the FCC's EBS and public inspection file rules are not minor. The monetary forfeiture penalties that were imposed followed the guidance provided in the FCC's *Policy Statement*. The FCC's Denver Office, moreover, substantially reduced the penalty recommended in the *Policy Statement* for the public inspection file violation. The Notice of Apparent Liability stated that this penalty was reduced "due to the over-all compliance of the File." The FCC has explained that it "takes into account many factors when deciding the amount of any forfeiture. These factors include the circumstances and seriousness of the violation, ... and the considerations specified in section 503(b)(2) of the Communications Act ... . Our policy of imposing substantial forfeitures for first or second violations is well-founded ... . [W]e cannot possibly detect every violation of our ... rules. Therefore, we must encourage consistent compliance by imposing forfeitures when, at various times, we discover violations." *Standard Communications Corporation*, 1 FCC Rcd at 358.

McCoy claims as part of its defense that "These are the first and only deficiencies noted by the FCC for KCCY" and that "KCCY has an outstanding record of ... public service." As explained above, lack of evidence regarding past noncompliance with the FCC's rules was taken into consideration in reducing the monetary forfeiture penalty.

Finally, McCoy objects to the monetary forfeiture penalty because it "is a small company with very limited resources" and because of the "tough economic times." The Communications Act of 1934 directs the FCC to consider ability to pay when imposing forfeitures. 47 U.S.C. Section 503(b)(2). If there is a serious problem in paying the monetary forfeiture penalty, the FCC needs reliable and verifiable supporting documentation. This documentation usually takes the form of income tax returns or audited financial information provided by an independent accountant. Therefore, if McCoy wishes to claim inability to pay, please provide the FCC with copies of its federal income tax returns or similar documentation for the last three years.

Please submit either this financial documentation of inability to pay or the $4,000 monetary forfeiture penalty within 30 days. The $4,000 forfeiture payment should be submitted by check or money order payable to the Federal Communications Commission. Please place the number 3153402-92022 on the check. The forfeiture payment should be sent to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If you wish to submit documentation regarding inability to pay, please send it to:

Federal Communications Commission
Higher Level Review, Enforcement Division
Field Operations Bureau (Stop Code 1500E3)
1919 M Street, N.W., Room 744
Washington, D.C. 20554

If neither the forfeiture payment nor documentation concerning inability to pay is submitted within 30 days, the forfeiture case will be referred to the U.S. Attorney for collection through a civil suit as provided in Section 504(a) of the Communications Act. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-552

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Provide
for the Use of the 220-222 MHz
Band by the Private Land Mobile
Radio Services

SECOND ERRATUM

Released: September 11, 1992

By the Chief, Private Radio Bureau:

1. On July 16, 1992, the Commission released a *Memorandum Opinion and Order*, FCC 92-261, in the above-captioned proceeding.[1] On August 28, 1992, the Commission released an *Erratum* (Mimeo No. 24589) to this *Memorandum Opinion and Order* correcting and clarifying rule changes adopted in the *Memorandum Opinion and Order* that were not consistent with the clear intention of the Commission expressed in the text. In the Appendix to the *Erratum*, however, the last few words of the last sentence of the revised paragraph 47 C.F.R. § 90.713(a)(5) were inadvertently deleted. This *Second Erratum* now contains the entire text of the initial *Erratum*, including the corrected version of 47 C.F.R. § 90.713(a)(5) in the Appendix.

2. Paragraph (a)(4) of Section 90.713 is now amended and reads as follows:

"(a)(4) Applicants for commercial nationwide channels must include an itemized estimate of the cost of constructing 40 percent of the system and operating the system during the first four years of the license term. Applicants for non-commercial nationwide channels must include an itemized estimate of the cost of constructing the entire system within five years and operating the system during the first five years of the license term."

3. Paragraph (a)(5) of Section 90.713 is now amended and reads as follows:

"(a)(5) Applicants for commercial nationwide channels must include proof that the applicant has sufficient financial resources to construct 40 percent of the system and operate the proposed system for the first four years of the license term: i.e., that the applicant has net current assets sufficient to cover estimated costs or a firm financial commitment sufficient to cover estimated costs. Applicants for non-commercial nationwide channels must include proof that the applicant has sufficient financial resources to construct the entire system within five years of the license grant and operate the proposed system for the first five years of the license term: i.e., that the applicant has net current assets to cover estimated costs or a firm financial commitment sufficient to cover estimated costs."

4. Paragraph (b) of Section 90.713 is now amended and reads as follows:

"(b) Applicants for commercial and non-commercial nationwide licensing relying on personal or internal resources for the showing required in paragraph (a) of this section must submit independently audited financial statements certified within one year of the date of the application showing net current assets sufficient to meet estimated construction and operating costs. Applicants for both commercial and non-commercial nationwide licensing must also submit an unaudited balance sheet, current within 60 days of the date of submission, that clearly shows the continued availability of sufficient net current assets to construct and operate the proposed system, and a certification by the applicant or an officer of the applicant organization attesting to the validity of the balance sheet."

5. Paragraph (c)(3) of Section 90.713 is now amended and reads as follows:

"(c)(3) Is willing, if the applicant is seeking a commercial nationwide license, to provide a sum to the applicant sufficient to cover the realistic and prudent estimated costs of construction of 40 percent of the system and operation of the system for the first four years of the license term; and"

6. A new paragraph (c)(4) is added to Section 90.713 and reads as follows:

"(c)(4) Is willing, if the applicant is seeking a non-commercial nationwide license, to provide a sum to the applicant sufficient to cover the realistic and prudent estimated costs of construction of a minimum of at least one base station in at least 70 different geographic areas designated in the application within five years of receiving a license, and operation of the system for the first five years of the license term."

7. Because each of these rule changes corrects errors, omissions, or inconsistencies and because these rule changes are required to clarify existing rules as they apply to applicants and prospective licensees of 220-220 MHz systems, IT IS FURTHER ORDERED that for good cause shown pursuant to the provisions of 5 U.S.C. § 553(d)(3) these rule changes are effective immediately upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

[1] The official text of the rule changes adopted in this item appears in 57 Fed. Reg. 32488 (1992).

APPENDIX

47 C.F.R. Part 90 is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303, and 332, unless otherwise noted.

2.47 C.F.R. § 90.713 is amended by revising paragraphs (a)(4), (a)(5), (b), and (c)(3), and by adding a new paragraph (c)(4) to read as follows:

§ 90.713 Entry criteria.

(a) * * *

(4) Applicants for commercial nationwide channels must include an itemized estimate of the cost of constructing 40 percent of the system and operating the system during the first four years of the license term. Applicants for non-commercial nationwide channels must include an itemized estimate of the cost of constructing the entire system within five years and operating the system during the first five years of the license term.

(5) Applicants for commercial nationwide channels must include proof that the applicant has sufficient financial resources to construct 40 percent of the system and operate the proposed system for the first four years of the license term: i.e., that the applicant has net current assets sufficient to cover estimated costs or a firm financial commitment sufficient to cover estimated costs. Applicants for non-commercial nationwide channels must include proof that the applicant has sufficient financial resources to construct the entire system within five years of the license grant and operate the proposed system for the first five years of the license term: i.e., that the applicant has net current assets to cover estimated costs or a firm financial commitment sufficient to cover estimated costs.

(b) Applicants for commercial and non-commercial nationwide licensing relying on personal or internal resources for the showing required in paragraph (a) of this section must submit independently audited financial statements certified within one year of the date of the application showing net current assets sufficient to meet estimated construction and operating costs. Applicants for both commercial and noncommercial nationwide licensing must also submit an unaudited balance sheet, current within 60 days of the date of submission, that clearly shows the continued availability of sufficient net current assets to construct and operate the proposed system, and a certification by the applicant or an officer of the applicant organization attesting to the validity of the balance sheet.

(c) * * *

(3) Is willing, if the applicant is seeking a commercial nationwide license, to provide a sum to the applicant sufficient to cover the realistic and prudent estimated costs of construction of 40 percent of the system and operation of the system for the first four years of the license term; and

(4) Is willing, if the applicant is seeking a noncommercial nationwide license, to provide a sum to the applicant sufficient to cover the realistic and prudent estimated costs of construction of a minimum of at least one base station in at least 70 different geographic areas designated in the application within five years of receiving a license, and operation of the system for the first five years of the license term.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-217

In the Matter of

Amendment of Section 73.202(b), RM-8069
Table of Allotments,
FM Broadcast Stations.
(Camden, East Camden and Stamps, Arkansas; Minden, Louisiana)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: September 1, 1992; Released: September 28, 1992

Comment Date: November 19, 1992
Reply Comment Date: December 4, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Y95 Radio ("petitioner"), licensee of Station KCXY(FM), Channel 237A, Camden, Arkansas, requesting the substitution of Channel 237C1 for Channel 237A at Camden, the reallotment of Channel 237C1 to East Camden, Arkansas, and modification of the license for Station KCXY(FM) accordingly. In order to accommodate the allotment at East Camden, petitioner also requests the substitution of Channel 282A for vacant but applied for Channel 238A at Stamps, Arkansas,[1] as well as the substitution of Channel 239A for Channel 237A at Minden, Louisiana, and modification of the license for Station KASO-FM, Channel 237A. Petitioner stated its intention to apply for Channel 237C1 if allotted to East Camden, as requested. Additionally, petitioner stated its willingness to reimburse the licensee of Station KASO-FM for its reasonable costs associated with the frequency change.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules. In this regard, petitioner advises that the requested change to East Camden, the location of its present transmitter site, is mutually exclusive with the allotment of Channel 237A at Camden, and that it does not intend to move from its authorized site.[2] As a result, Camden will continue to receive aural transmission service from Station KCXY(FM). In further support of its proposal, petitioner advises that East Camden (population 632),[3] is an incorporated community, which has its own local government, numerous businesses and other attributes of a community including banking facilities and a post office. Furthermore, petitioner advises that in addition to its Station KCXY(FM), Camden (population 15,356) also receives local service from Station KWEH(FM), Channel 246C2, and potential service from Channel 283A, vacant but applied for,[4] as well as service from full time Stations KAMD(AM) and KJWH(AM). Conversely, East Camden has no local aural transmission service. Petitioner submits that adoption of its proposal would provide an expanded service to 166,603 persons in an area of 16,374 square kilometers, representing an increase of 137,855 persons and an area of 14,791 square kilometers.

3. Petitioner asserts that additional benefits of its proposal would accrue to Stamps, Arkansas, and Minden, Louisiana, to the extent it would provide Stamps with a 6 kilowatt Class A allotment, and would provide Station KASO-FM the opportunity to operate at maximum Class A facilities, advantages which are not presently available to either community.

4. We believe the proposal warrants further consideration since it could provide East Camden with its first local aural transmission service. As noted above, Camden will not be deprived of local aural transmission service. Further, neither Camden nor East Camden are located within any Urbanized Area. Finally, the requested allotment of Channel 237C1 is mutually exclusive with the present allotment of Channel 237A at Camden. However, since Station KCXY(FM) is not required to change its site in order to obtain an upgrade, we request petitioner to submit additional information concerning the public interest benefits that would accrue from the change in community.

5. Channel 237C1 can be allotted to East Camden at the presently authorized site for Station KCXY(FM)[5] consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.[6] Channel 282A can be substituted for Channel 238A at Stamps, Arkansas, with a site restriction 12.2 kilometers (7.6 miles)

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[1] The applicant for Channel 238A at Stamps, Arkansas is Lafayette County Broadcasting, Inc. (File No. BPH-920401MB).

[2] Coordinates at the licensed site of Station KCXY(FM) are 33-30-14 and 92-48-38.

[3] Population figure cited herein were taken from the 1990 U.S. Census.

[4] The applicant for Channel 283A at Camden is Gary Coates (File No. BPH-881220MD).

[5] As indicated above, coordinates used for Channel 237C1 at East Camden are 33-30-14 and 92-48-38.

[6] The proposal for Channel 237C1 at East Camden is short spaced to Station KMTB(FM), Channel 237A, Murfreesboro, Arkansas, at coordinates 34-05-44 and 93-41-31, and therefore dependent upon Station KMTB(FM) moving to Channel 258C3 in accordance with the modification provisions set forth in MM Docket No. 89-290. *See Report and Order* (MM Docket No. 89-290), 7 FCC Rcd _____ (adopted July 31, 1992). Since the East Camden allotment proposal is dependent upon the grant of a license for Station KMTB(FM) on Channel 258C3, the issuance of a license for Station KCXY(FM) on Channel 237C1

west of the community.[7] Channel 239A can be allotted to Minden, Louisiana, at the presently licensed transmitter site for Station KASO-FM.[8]

6. The petitioner's modification request at East Camden is consistent with the provisions of Section 1.420(g) and (i) of the Commission's Rules. Therefore, we shall propose to modify the license of Station KCXY(FM) without entertaining competing expressions of interest in the use of Channel 237C1 at East Camden, or requiring the petitioner to demonstrate the availablity of an additional equivalent class channel for use by such parties. In addition, we shall direct an *Order to Show Cause* to Cook Enterprises, Inc., licensee of Station KASO-FM, Minden, Louisiana, seeking comments as to why its license should not be modified to specify operation on Channel 239A in lieu of Channel 237A. Commission policy requires that Station KASO-FM be reimbursed for the reasonable costs incurred in changing frequencies. *See Circleville, OH*, 8 FCC 2d 159 (1976). Petitioner has stated its willingness to reimburse Station KASO-FM for its reasonable costs associated with moving to Channel 239A.

7. We are also serving a copy of this *Notice* on the applicant for Channel 238A at Stamps, Arkansas. In the event this proceeding is finalized prior to the issuance of a permit for Channel 238A at Stamps, the applicant may amend its application accordingly. Such amendment may be accomplished without the loss of cut off protection. *See Salamanca, NY and Bradford, PA*, 50 Fed. Reg. 26208 (1985), and *Sanibel, FL*, 50 Fed. Reg. 32706 (1985).

8. In view of the above, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with regard to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Camden, Arkansas	237A, 246C2, 283A	246C2,283A
East Camden, Arkansas	--	237C1
Stamps, Arkansas	238A, 263C2	263C2, 282A
Minden, Louisiana	237A	239A

9. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Cook Enterprises, Inc., licensee of Station KASO-FM, Channel 237A, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 239A in lieu of Channel 237A.

10. Pursuant to Section 1.87 of the Commission's Rules, Cook Enterprises, Inc. may, not later than **November 19, 1992,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Cook Enterprises, Inc. to furnish additional information. If Cook Enterprises, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Cook Enterprises, Inc. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

11. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by Certified Mail, Return Receipt Requested, to the following:

Cook Enterprises, Inc.
P.O. Box 1240
Minden, LA 71055
(Licensee of Station KASO-FM)

Lafayette County Broadcasting, Inc.
Rte. 1, Box 179
Stamps, AR 71860
(Applicant - Stamps, AR)

Mediatronics Broadcasting, Inc.
P.O. Box 907
Murfreesboro, AR 71958
(Licensee of Station KMTB(FM))

12. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

13. Interested parties may file comments on or before **November 19, 1992,** and reply comments on or before **December 4, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Mark E. Fields, Esq.
Law Office of Mark E. Fields
1825 I Street, N.W.
Suite 400
Washington, D.C. 20006

14. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table

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may be withheld until Station KMTB(FM) is authorized to operate on its new channel. The licensee of Station KMTB(FM) will be served with a copy of this *Order*.

[7] Coordinates used for Channel 282A at Stamps are 33-23-20 and 93-37-38. The site restriction is required to avoid short spacing to Channel 283A, Camden, Arkansas, at coordinates 33-35-06 and 92-50-00, and to the licensed site for Station KJLO-FM, Channel 281C, Monroe, Louisiana, at coordinates 32-39-36 and 92-05-15.

[8] Coordinates for Channel 239A at Minden are 32-37-50 and 93-16-56.

of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

15. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-176

In the Matter of

Amendment of Section 73.202(b),	RM-7053
Table of Allotments,	RM-8040
FM Broadcast Stations.	
(Arnold[1] and Columbia, California)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 31, 1992; Released: September 28, 1992

By the Chief, Policy and Rules Division:

1. Before the Commission are two Petitions for Reconsideration of the *Report and Order* in this proceeding, 6 FCC Rcd 3292 (1991), filed by Eric R. Hilding ("Hilding") and by Clarke Broadcasting Corporation ("Clarke").[2] The *Report and Order* denied a petition for rule making filed by Hilding, seeking a new allotment at Columbia, California, and also denied a mutually exclusive counterproposal filed by Clarke, seeking a new allotment at Arnold, California.[3] Hilding filed a Petition to Accept Late Filing and a Motion to Dismiss Clarke's Petition for Reconsideration. Clarke filed an Opposition to the Late Filed Pleading and the Motion to Dismiss, as well as Opposition to Hilding's Petition for Reconsideration.

2. *Background.* This proceeding originated with a petition for rule making filed by Hilding which proposed the allotment of Channel 255A to Columbia, California, as that community's first local FM service. In the *Notice of Proposed Rule Making*, 5 FCC Rcd 2003 (1990), the Commission stated that because Columbia is not listed in the U.S. Census, "Hilding should present the Commission with sufficient information to demonstrate that Columbia is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a 'community' for allotment purposes.[4] Thereafter, H-Group, Inc., predecessor in interest to Clarke, filed a timely counterproposal to the *Notice* seeking a mutually exclusive allotment of Channel 256A to Arnold, California, as that community's first local FM service. Hilding filed supporting comments with information regarding Columbia's community status. Hilding also filed reply comments to the counterproposal, suggesting two alternate channels for use at Arnold.

3. The *Report and Order* denied the petition filed by Hilding. Although Hilding had supplied some information regarding the community status of Columbia, it was deemed insufficient to show that Columbia functioned as a "community" for allotment purposes. The *Report and Order* also denied the counterproposal filed by H-Group as unacceptable because H-Group failed to submit a technical showing demonstrating that the proposed allotment of Channel 256A at Arnold complied with the Commission's minimum distance separation requirements.[5]

4. *Petitions for Reconsideration.* Hilding's petition for reconsideration argues that Columbia is a community for allotment purposes and is deserving of first local service. Hilding states that the Commission has made FM allotments to unincorporated communities and that failure to do so in this instance constitutes error. Hilding submits for the first time a list of businesses on an attached affidavit which, he states, evidences the community status of Columbia. Hilding further argues that natural disasters in the state of California should provide justification for an allotment to a remote area such as Columbia.[6]

5. In his petition to accept late filing and motion to dismiss Clarke's petition for reconsideration, Hilding states that the Arnold proposal has "some merit" and that he would not object to the reinstatement of the Clarke petition as long as the disposition of this proceeding results in dual allotments to both Columbia and Arnold. Hilding notes that he previously suggested the allotment of either Channel 222A or Channel 240A, instead of Channel 256A, to Arnold.[7]

6. Clarke's petition for reconsideration requests reinstatement of its counterproposal as a petition for rule making to allot Channel 256A to Arnold. Clarke contends that it submitted all necessary information and that its counterproposal was acceptable when filed. Clarke requested a specific channel and class, submitted specific transmitter site coordinates for the proposal, and represented that the station would meet the minimum separation requirements of Section 73.207(b) of the Commission's

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[1] The community of Arnold, California has been added to the caption.

[2] Clarke is the successor in interest to H-Group, Inc., formerly a wholly owned subsidiary of Clarke which merged into its parent on May 31, 1990 pursuant to Commission approval. *See* FCC File Nos. BAL-900213EA, BALH-900213EB and BAHL-900213EC.

Public Notice of the filing of both petitions for reconsideration was given on February 21, 1992, 57 Fed. Reg. 6225.

[3] In order to permit consideration of all pleadings submitted and to speed final resolution of this proceeding, Clarke's petition for rule making was placed on public notice as a counterproposal in Report No. 1901, released July 22, 1992. Clarke filed comments in response to the public notice indicating its continuing interest in an allotment at Arnold and its intention to apply for the channel if allotted. No other comments were received in response to the public notice.

[4] Citing *Ansley, Alabama*, 46 Fed. Reg. 58688, December 3, 1981, *Cascade Village, Colorado*, 48 Fed. Reg. 19917, May 3, 1983, *Ellwood, California*, 50 Fed. Reg. 13031, April 2, 1985.

[5] The *Report and Order* cited to *Eldorado and Lawton, OK*, 5 FCC Rcd 6737 (1990), and cases cited therein in support of the dismissal.

[6] Hilding also alleges that Clarke's petition for reconsideration was filed to obstruct his proposal. We find this allegation unsubstantiated, and will not consider it herein.

[7] Hilding also argues that Clarke's petition for reconsideration should be dismissed as late filed. We find that Clarke's reconsideration was timely filed. Pursuant to Commission Rule 1.4(b), as then in effect, petitions for reconsideration in this docket were due July 10, 1991. Clarke filed its reconsideration on July 9, 1991.

Rules. Clarke argues that upon presentation of this information, the counterproposal was technically correct and substantially complete, in that it contained the necessary information to afford all parties an opportunity to respond fully in reply comments. Clarke contends that our Rules do not require the submission of a separate engineering analysis in order to meet the minimum requirements for a counterproposal's acceptability, and that the Commission's staff does not have the authority to institute such a requirement.

7. In its opposition to Hilding's petition for reconsideration and to Hilding's petition to accept late filing and motion to dismiss, Clarke maintains that Hilding's petition is not acceptable for consideration because Hilding failed to verify the petition and also failed to serve a copy of the petition on Clarke. Relying on Section 1.52 of the Commission's Rules as well as prior Commission cases, Clarke states that Hilding's failure to comply with our rules should result in the dismissal of the defective petition without further consideration.[8] Clarke also states that Hilding's failure to serve a copy of the petition on Clarke cannot be cured and therefore, the petition should be dismissed. Clarke also attacks Hilding's substantive claims with respect to Columbia's community status. It claims that in the event the proposals are comparatively considered, the allotment to the larger community of Arnold should be preferred to the Columbia proposal. Clarke rejects the alternative channels which Hilding previously suggested. In an engineering statement, Clarke claims that Channel 222A would require an excessive site restriction, and Channel 240A would likely present line-of-sight coverage problems to Arnold.

8. *Discussion.* After full consideration of the pleadings in this case, we will grant both petitions for reconsideration and will give full consideration to both proposals herein. Having placed the Clarke proposal on public notice, we may dispose of both petitions at this time. We note from the outset that an engineering analysis conducted in response to these petitions indicates that there is an alternative channel available, which will permit both parties to receive an allotment.

9. We will consider Hilding's petition for reconsideration despite its procedural deficiencies. Section 1.52 of our Rules requires that a petitioner, unless represented by legal counsel, sign and verify all pleadings submitted to the Commission. Hilding's pleadings in this proceeding did not contain a statement that the information was true and accurate to the best of his knowledge. Hilding made no attempt to cure this defect, even after it had been pointed out by Clarke in its motion to dismiss the Hilding petition. The Commission vigorously pursues compliance with all of the procedural requirements of our Rules. However, we believe it inappropriate to deny the community of Columbia service when, as here, acceptance of the defective pleading will not prejudice any party in the proceeding. Similarly, although Hilding failed to serve the petition for reconsideration on Clarke as required by Section 1.429(f) of our Rules, we do not believe that Clarke was prejudiced by such failure. Clarke responded fully to all pleadings within the time limits specified by our rules, and did not make any specific claims of prejudice due to the lack of service. Again, Hilding failed to cure this defect in any responsive pleading.[9] We therefore emphasize that it is only because of the lack of prejudice to the other interested party in this proceeding, and the public interest benefits of providing service to Columbia, that we have chosen to accept Hilding's petition for reconsideration and examine the substantive issues therein.

10. With respect to the petition for reconsideration filed by Clarke, we agree that the information initially provided by Clarke was sufficient, to the extent that the information permitted Hilding to fully respond to the counterproposal.[10] Therefore, because all of the elements necessary for a complete response were submitted with the original counterproposal, we have reinstated the petition.

11. We agree with Hilding that Columbia should have been found to constitute a community for allotment purposes. If a community is not listed in the U.S. Census or incorporated, the proponent of an allotment must show the location to be a geographically identifiable population grouping. *Revision of FM Assignment Polices and Procedures*, 90 FCC 2d 88,101 (1982). This may be proven by the "testimony of local residents or by objective indications of the existence of a common perception that a locality's populace constitutes a distinct 'geographical population grouping'." *Beacon Broadcasting*, 2 FCC Rcd 3469 (1987), *aff'd* 2 FCC Rcd 7562 (1987). Objective indicia of community status include the existence of political, commercial, social and religious organizations and services in the community. *See Semora, North Carolina*, 5 FCC Rcd 934 (1990). However, we note that not all of the above indicia are required to be shown and further that the Commission has never established a minimum amount of commercial activity necessary to qualify an area as a community.[11]

12. Although Columbia is neither incorporated nor was it listed in the 1980 U.S. Census, Columbia is now listed as a Census Designated Place ("CDP") in the 1990 U.S. Census with a population of 1,799. The listing of Columbia as a CDP raises a strong presumption of community status. Even absent this listing, reexamination of the original documents submitted by Hilding in response to the *Notice* indicate that there was sufficient evidence submitted to prove community status. Hilding indicated that Columbia has a chamber of commerce, a local school, bank, hotel, post office, two year state community college, and a branch of the California State Docent Society. We believe that the existence of these businesses and services are sufficient objective indicia of community.[12]

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[8] Citing *Monroeville and Thomasville, Alabama*, 5 FCC Rcd 7027 (1990), and *Moscow, Ohio, et al.*, 3 FCC Rcd 3441 (1988)

[9] *See e.g., Lopez and Dushore, Pennsylvania*, 7 FCC 854 (1992).

[10] However, we encourage all petitioners to timely submit all available information and data, including channel, class, specific transmitter site and engineering studies. Inclusion of this information permits all parties the opportunity to fully respond and permits the Commission staff to more readily determine compliance with the Commission's minimum distance separation requirements. These minimal requirements, which virtually all proponents meet, permit efficient processing of rule making proposals and do not impose a burden on any rule making proponent.

[11] *Id.*, 5 FCC Rcd at 935.

[12] In reaching this determination, we need not consider the additional information Hilding submitted in his petition for reconsideration.

13. We need not comparatively compare these proposals, as there is an alternate channel available for Arnold. Contrary to Clarke's allegations, our engineering analysis indicates that Channel 240A can be allotted to Arnold at a site that would provide line-of-sight coverage to the community. We note that if comparative consideration of the proposals was required, we would allot the channel to Columbia as that community's first local transmission service. While Clarke claims that its proposal, when initially filed, would have provided Arnold with a first local transmission service, the Commission's staff subsequently allotted Channel 291A to Arnold in response to a separate petition for rule making. *See Dorrington and Arnold, California*, 6 FCC Rcd 4860 (1991). We note that Clarke did not file an application for that channel. Therefore, Clarke's proposal would provide a second local transmission service to Arnold.

14. As indicated in the *Notice*, Channel 255A can be allotted to Columbia at Hilding's proposed site[13] in compliance with the minimum distance separation requirements of the Commission's Rules. We believe the public interest would be served by the allotment of Channel 255A at Columbia, California because it would provide that community with its first local transmission service. We also believe the public interest would be served by the allotment of Channel 240A at Arnold, California, because it would provide that community with its second local transmission service. Channel 240A can be allotted to Arnold in compliance with the minimum distance separation requirements of the Commission's Rules, with a site restriction 5.2 kilometers (3.2 miles) north to avoid a short spacing to Station KNTO, Channel 240A, Livingston, California and to Station KYMX, Channel 241B, Sacramento, California.[14]

15. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 12, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Columbia, California	255A
Arnold, California	240A, 291A

16. IT IS ORDERED, That the window period for filing applications for Channel 255A, Columbia and Channel 240A, Arnold, California will open on **November 13, 1992,** and close on **December 14, 1992.**

17. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Eric R. Hilding IS GRANTED.

18. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Clarke Broadcasting, Inc. IS GRANTED.

19. IT IS FURTHER ORDERED, That the Petition to Accept Late Filing and the Motion to Dismiss Clarke Broadcasting Petition filed by Hilding is DENIED.

20. IT IS FURTHER ORDERED, That the Opposition of Clarke Broadcasting to Petition to Accept Late Filing and Motion to Dismiss Clarke Broadcasting Petition, and to Hilding Petition for Reconsideration filed by Clarke is DENIED.

21. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[13] Coordinates for this allotment are North Latitude 38-02-11 and West Longitude 120-24-01.

[14] The coordinates for the allotment of Channel 240A at Arnold are North Latitude 38-18-03 and West Longitude 120-20-08. We note that this site will not create any prohibited overlap with Clarke's Station KZSQ, Sonora, California.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-237

In the Matter of

Amendment of Section 73.202(b), RM-7744
Table of Allotments,
FM Broadcast Stations.
(Bayboro, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 31, 1992; Released: September 28, 1992

By the Chief, Allocations Branch:

1. At the request of Atlantic Broadcasting, Inc. ("Atlantic"), licensee of Station WKZF(FM), Bayboro, North Carolina, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 4850 (1991) ("*Notice*"), proposing the substitution of Channel 250C3 for Channel 250A at Bayboro, and modification of its license to specify operation on the higher class channel. Petitioner filed comments in support. No other comments were filed.

2. In the *Notice*, we stated that a Commission engineering analysis showed that the site designated by the coordinates submitted by Atlantic were offshore and therefore not suitable for tower construction.[1] We therefore requested that petitioner address this issue in its comments and submit additional information as to site availability.

3. In its comments in support, petitioner states that it has located a site which is on dry land, is not in wetlands and presents no environmental concerns. Further, in supplemental comments, it includes a showing that its proposed site has received clearance from the Federal Aviation Administration. Petitioner also reiterates its intention to apply for the channel.

4. We believe the public interest would be served by allotting Channel 250C3 at Bayboro, North Carolina, and modifying the license of Station WKZF(FM) because it would provide the community and the surrounding areas with improved service. Channel 250C3 can be allotted to Bayboro at petitioner's site 17.6 kilometers (9.1 miles) southeast of the community.[2] A Commission engineering analysis confirms that petitioner's site is acceptable and complies with our requirements regarding minimum distance separation and city grade coverage.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 12, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Bayboro, North Carolina	250C3

6. IT IS FURTHER ORDERED, That, pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Atlantic Broadcasting, Inc., for Station WKZF(FM), Channel 250A, IS MODIFIED to specify operation on Channel 220C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission an application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Atlantic Broadcasting, Inc., licensee of Station WKZF(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] Atlantic's proposed site was 17.3 kilometers (10.8 miles) southeast of Bayboro at coordinates 35-04-16 and 76-36-15. The *Notice* proposed an alternate site 11.6 kilometers (7.2 miles) southeast of Bayboro, at coordinates 35-07-18 and 76-38-40.

[2] Channel 250C3 can be allotted at Bayboro at coordinates 35-04-47 and 76-37-58.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-124

In the Matter of

Amendment of Section 73.202(b), RM-8001
Table of Allotments,
FM Broadcast Stations.
(Dunsmuir, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 3, 1992; Released: September 28, 1992

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 7 FCC Rcd 3777 (1992), issued in response to a petition filed by Fatima Response, Inc. ("petitioner"), permittee of Station KRKD(FM), Channel 261A, Dunsmuir, California, proposing the substitution of Channel 261C3 for Channel 261A and modification of its permit[1] accordingly to specify the higher powered channel. Petitioner filed supporting comments stating its intention to apply for Channel 261C3 if allotted to Dunsmuir, as requested.[2] No other comments were received.

2. We believe the public interest would be served by substituting Channel 261C3 for Channel 261A at Dunsmuir since it could provide an expanded coverage FM service to the community. Therefore, pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the permit of Fatima Response, Inc., for Station KRKD(FM), as requested. As stated in the *Notice*, Channel 261C3 can be allotted to Dunsmuir at the petitioner's currently authorized site[3] consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 12, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Dunsmuir, California	261C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Fatima Response, Inc. (BPED-910408MA) for Station KRKD(FM), IS MODIFIED to specify operation on Channel 261C3 in lieu of Channel 261A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Fatima Response, Inc., permittee of Station KRKD(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade at Dunsmuir, California.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] As indicated in the *Notice*, the file number originally assigned to the petitioner's construction permit contained a commercial prefix (BPH-910408MA). However, the prefix was subsequently changed to BPED-910408MA to reflect the petitioner's intended use of Channel 261 as an educational facility.

[2] As stated in the *Notice*, although petitioner's request was signed and its address given, it failed to verify the statements contained in the petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in its responsive comments, and has done so.

[3] Coordinates used for Channel 261C3 at Dunsmuir are 41-17-20 and 122-14-25.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-138

In the Matter of

Amendment of Section 73.202(b), RM-7040
Table of Allotments,
FM Broadcast Stations.
(Newnan and Peachtree City,
Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 31, 1992; Released: September 28, 1992

By the Chief, Allocations Branch:

1. At the request of South Metro Broadcasting Co. Inc. ("South Metro"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 1774 (1990), proposing the reallotment of Channel 244A from Newnan, Georgia, to Peachtree City, Georgia, and the modification of Station WMKJ(FM)'s license to specify Peachtree City, Georgia, as its community of license. South Metro filed comments restating its intention to apply for the channel, if allotted. Summit-Atlanta Broadcasting Corporation, licensee of Station WVEE(FM), Atlanta, Georgia, and WSB, Inc., licensee of Station WSB(FM), Atlanta, Georgia, jointly filed opposing comments ("Summit/WSB"). South Metro filed reply comments.[1]

2. Summit/WSB argue that the proposed reallotment to Peachtree City is short-spaced to Station WKLS(FM), Atlanta, Georgia, and therefore must be denied. They assert that Station WMKJ(FM)'s status as a "grandfathered" station under Section 73.213 of the Rules does not justify the creation of a new short-spaced allotment. They note that the Commission will not make a short-spaced allotment,[2] and that we have rejected attempts to use Section 73.213 to justify substandard allotments, citing *Front Royal, Virginia* 10 RR 2d 1752 (1967). Consideration of this proposal, they argue, "announces a substantially more lenient allotment separation requirement for any currently short-spaced station which seeks a community of license change" in which a short spaced reallotment is acceptable, provided that the current substandard spacing is not exacerbated. Summit/WSB maintains that such a policy is a wholly unjustified expansion of Section 1.420(i). According to Summit/WSB, this approach would permit stations short-spaced under Section 73.207 to propose substandard reallotments which satisfy the less stringent spacing requirements of Sections 73.213 and 73.215, whereas licensees and permittees seeking upgrades under Section 1.420(g) must meet the full spacing standards of Section 73.207.[3]

3. In response, South Metro alleges that Summit/WSB have not asserted a basis for standing in this proceeding. Neither entity is the licensee of Station WKLS(FM), the allegedly aggrieved station, and they have failed to demonstrate that they are interested parties to this proceeding.[4] Addressing the comments on substantive grounds, South Metro notes that its Station WMKJ(FM) is currently short-spaced to Station WKLS(FM), and the short-spacing has existed since the Commission created its FM Table of Allotments and spacing requirements in the 1960's. In doing so, South Metro argues, the Commission recognized that a number of stations would be short-spaced under its rules, and granted the affected stations "grandfathered" status. South Metro notes that the Commission did not specifically address grandfathered short-spacing situations in adopting Section 1.420(i), but contends that there is no reason for the Commission to except stations which are currently short-spaced from using this policy. It also maintains that the precedents cited by Summit/WSB are inapplicable, as South Metro is not requesting the creation of a new or exacerbation of an existing short-spacing in this proceeding. South Metro also states that Station WMKJ(FM) currently places a 70 dBu signal over Peachtree City at its current transmitter site, so it could operate from its current site if this proposal was adopted. Finally, South Metro provides information relevant to the community status of Peachtree City and two letters in support of the reallotment.

4. Based on the information before us, we believe the public interest would be served by reallotting FM Channel 244A from Newnan to Peachtree City, Georgia, at the current site of Station WMKJ(FM). South Metro has shown that the reallotment will result in a preferential arrangement of allotments. The larger community of Peachtree City (population 19,027),[5] which is located approximately 48.3 kilometers (30 miles) from downtown Atlanta, will receive its first local aural transmission service. Newnan (population 12,497), which is located 56.3 kilometers (35 miles) from downtown Atlanta and ap-

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[1] After the close of the comment period, South Metro filed a letter regarding its petition. Commission Rule 1.415(d) precludes the filing of comments after the close of the reply comment period. Therefore, we will not consider this pleading herein.

[2] Summit/WSB cite *Franklin, New Hampshire*, 49 R.R. 2d 703, 707 (1981), *Vass, North Carolina*, 45 R.R. 2d 1741 (1979), *Millington, Maryland*, 45 R.R. 2d 1689 (1979), *Murphy, North Carolina*, 37 R.R. 2d 837 (1976), and *Bay Shore, New York*, 59 R.R. 2d 1652 (1986).

[3] Summit/WSB also offer general objections to Rule 1.420(i) which are not relevant to this proceeding and will not be considered herein. Generally, these objections were addressed separately in *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License (Memorandum Opinion and Order)*, 5 FCC Rcd 7094 (1990).

[4] South Metro also alleges that Summit/WSB's comments do not comply with Section 1.49(b) and (c) of the Rules, which require a summary and table of contents for any pleading of ten or more pages. Although South Metro is correct, we will consider Summit/WSB's comments in their entirety in order to permit full consideration of all relevant information in this proceeding. This action will not prejudice South Metro in any manner.

[5] Population figures are taken from the 1990 U.S. Census.

proximately 20.9 kilometers (13 miles) east of Peachtree City, will retain local transmission service from full-time Station WCOH(AM) and daytime Station WNEA(AM).

5. We deny Summit/WSB's objections to the reallotment. We have stated that we will consider waiving strict application of Section 73.207 in limited circumstances, provided that no new short spacings are created, no existing short spacings are exacerbated, and the potential for interference between the currently short spaced stations is not increased. *See Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd 6580 (1991), *app. for rev. pend.* In this case, since Station WMKJ(FM) can provide city grade coverage to Peachtree City from its current site, adoption of this proposal will not affect the grandfathered short spacing between Stations WMKJ(FM) and WKLS(FM), Channel 241C, Atlanta, and no new short spacings will be created. Similarly, since no change in technical facilities is contemplated, the potential for interference between the stations will not change.

6. Channel 244A can be allotted to Peachtree City in compliance with the Commission's minimum distance separation requirements of the Rules, with a site restriction of 11.8 kilometers (7.3 miles) southwest, at Newnan's current transmitter site,[6] instead of the site (33-22-46 and 84-37-22) specified in the *Notice*. The site restriction will maintain the present short spacing to Station WKLS(FM), Channel 241C, Atlanta, Georgia. In accordance with Section 1.420(i) of the Commission's Rules, we will modify the license for Station WMKJ(FM), Channel 244A to specify Peachtree City, Georgia, as its community of license.

7. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 12, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Newnan, Georgia	----
Peachtree City, Georgia	244A

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of South Metro Broadcasting Co. Inc., for Station WMKJ(FM), Channel 244A, Newnan, Georgia, IS MODIFIED, to specify Peachtree City, Georgia, in lieu of Newnan, Georgia, as its community of license, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[6] The coordinates for Channel 244A at Peachtree City are North Latitude 33-26-22 and West Longitude 84-42-42. Because this petition was filed prior to October 2, 1989, the licensee of Station WMKJ(FM), Peachtree City, may avail itself of the provisions of Section 73.213(c) of the Commission's Rules with respect to Station WMXA-FM, Channel 244A, Opelika, Alabama, at coordinates 32-37-34 and 85-19-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-67

In the Matter of

Amendment of Section 73.202(b),	RM-7482
Table of Allotments,	RM-7026
FM Broadcast Stations.	RM-7057
(Bon Air, Chester, *Mechanicsville*, Ruckersville, *Williamsburg* and *Fort Lee, Virginia*)[1]	

SECOND REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 31, 1992; Released: September 28, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 5 FCC Rcd 1124 (1990), as well as the *First Report and Order*, 6 FCC Rcd 4917 (1991), which deferred final action on a proposal filed by Keymarket of Virginia ("Keymarket"), licensee of Station WQSF(FM), Channel 243B, Williamsburg, Virginia, requesting a change of community of license to Mechanicsville, Virginia.[2]

2. In timely filed comments in support of its proposal, Keymarket requested, in the alternative, a change of community to Fort Lee, Virginia.[3] Comments filed by ABS Richmond Partners ("ABS"), Capitol Broadcasting of Virginia, Inc. ("Capitol"), Edens Broadcasting, Inc. ("Edens"), Roy H. Park Broadcasting of Virginia ("Park"), and Summit-Atlanta Broadcasting Corporation all opposed the Keymarket proposal.[4] A counterproposal filed by Richard J. Hayes and Associates, Inc. for the allotment of Channel 226A at Ettrick, Virginia, was subsequently withdrawn.[5] Keymarket and Sinclair filed consolidated reply comments in support of their proposals. In a supplement to its reply comments, Keymarket included information in support of the community status of Fort Lee. ABS, Capitol and Edens filed reply comments challenging both the contention that Williamsburg is part of an urbanized area, and the community status of Fort Lee. In addition, late filed comments were filed by Rappahannock Communications Group, Inc. ("RCGI"), an applicant for a construction permit for Channel 245A at Bowling Green, Virginia, requesting the specification of an alternate reference site 14.3 kilometers (8.9 miles) southeast of Keymarket's requested site for the reallotment of Station WQSF(FM) to accommodate the site specified in RCGI's application.[6] Keymarket filed comments in opposition, and RCGI responded.

3. As justification for its proposed change of community, Keymarket states that Williamsburg is also served by two other stations, Station WMBG(AM) and Station WCWM(FM), and therefore the proposed change of community will not remove Williamsburg's sole local transmission outlet. Keymarket asserts that since Williamsburg is part of an urbanized area,[7] and Mechanicsville and Fort Lee are in the urbanized areas of Richmond and Petersburg, respectively, Station WQSF(FM)'s change of community would constitute a move from one urbanized area to another urbanized area. Therefore, Keymarket argues, its proposed change of community will not deprive Williamsburg of a local service, because Williamsburg should be considered to be served by the stations serving the urbanized area of which it is a part. In opposition, ABS, Edens, Capitol, and Roy H. Park argue that because Station WMBG(AM) has limited nighttime service, and

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[1] The community of Fort Lee, Virginia has been added to the caption.

[2] The *First Report and Order* granted a proposal filed by Sinclair Telecable, Inc., licensee of Station WCDX(FM), Channel 224A, Mechanicsville, Virginia, to substitute Channel 221B1 for Channel 224A at Mechanicsville, and to modify its license for Station WCDX(FM) to specify operation on the higher class channel. This proposal also required channel substitutions at Chester (Channel 226A for Channel 221A) and Ruckersville, Virginia (Channel 270A for Channel 221A). Sinclair originally had requested a change in community to Bon Air, Virginia, but subsequently withdrew its request to change community, as well as its counterproposals requesting new allotments at Burkeville and Grottoes, Virginia. Two petitions for reconsideration of this *First Report and Order* were filed, and subsequently withdrawn. *See Memorandum Opinion and Order*, 7 FCC Rcd 2844 (1992).

[3] The Fort Lee counterproposal was accepted and placed on public notice. *See* Report No. 1825, September 5, 1990.

[4] In its opposition, ABS argues that Keymarket has made misrepresentations to the Commission in this proceeding and in an application for assignment of license of Station WQSF(FM). ABS has pointed to no evidence, beyond the planning and filing of the instant proposal, that Keymarket's representations in the WQSF assignment application with respect to service to Williamsburg were untruthful. Keymarket has continued to serve Williamsburg throughout the planning and pendency of its proposal. Because we have long recognized that alternative spectrum use arrangements may serve the public interest, we decline to adopt the approach urged by ABS, the effect of which would be to penalize Keymarket merely for conceiving and advancing its proposal. To the extent that ABS or the other commenters have raised issues with respect to anticompetitive practices between Keymarket and Sinclair, the withdrawal of Sinclair's proposal to change community rendered those issues moot. However, we note that the mere fact that the parties filed proposals simultaneously does not indicate that any anticompetitive practice has occurred. Finally, we note that any challenges addressing the Commission's change of community rule in general are not properly raised in this proceeding.

[5] A petition for rule making filed by Snow Hill Community Broadcasters proposing the allotment of Channel 243A to Snow Hill, Maryland, will be the subject of a separate *Notice of Proposed Rule Making* which will consider the allotment of a Class A channel to the community.

[6] We will accept RCGI's comments. Although the Commission's Rules do not contemplate the filing of late pleadings, we believe that their acceptance will serve the public interest, and we do not believe that it would prejudice any party in this matter.

[7] Williamsburg was in the Hampton-Newport News Urbanized Area at the time of filing, but now is designated as part of the Norfolk-Newport News-Virginia Beach Urbanized Area according to 1990 U.S. Census statistics.

Station WCWM(FM) is a non-commercial-educational station, removal of Station WQSF(FM) from Williamsburg will deprive the community of its only full-time local service, and render it "underserved." They also argue that Williamsburg is an independent community of historical significance, and thus, while it is located within the Norfolk-Virginia Beach-Newport News Urbanized Area, it is not sufficiently "interdependent" pursuant to *Huntington Broadcasting Co. v. F.C.C.*, 192 F.2d 33 (D.C. Cir. 1951), to be treated as indistinguishable from the urbanized area.

4. In support of its alternate community proposal, Keymarket states that Fort Lee should be considered a community for allotment purposes. Commenters in opposition, ABS, Capitol and Edens challenge Fort Lee's status as a community, arguing that is a military base with no local services independent of the U.S. Government. They also argue that it should not warrant a first local service preference, in any event, because it is within the Petersburg Urbanized Area as defined by the U.S. Census.

5. In its comments, RCGI states that its application, which was granted conditioned on the outcome of this proceeding, proposes a site for a 6 kW facility which is short-spaced to the reference coordinates proposed by Keymarket.[8] In its opposition, Keymarket argues that RCGI's late-filed comments should not be considered on procedural grounds due their extreme tardiness. Keymarket also argues that RCGI's request should not be granted because since it was allotted as a 3kW facility under the "old" minimum distance separation requirements that were in effect prior to October 2, 1989, it is not entitled to a 6 kW facility and because use of the alternate site RCGI proposes would result in less than 100% coverage of Mechanicsville within the 70dBu contour. In its response, RCGI states that its alternate site would "provide 94% coverage to Mechanicsville and 100% coverage to Fort Lee, and would result in a less than 1% change in population served, and therefore should be acceptable in either case.

6. *Discussion.* We will grant Keymarket's proposal to reallot Channel 243B from Williamsburg, Virginia, to Fort Lee, Virginia, and modify its license to specify the new community of license. In so finding, we have determined that a change of community is warranted, and that Fort Lee qualifies as a community for allotment purposes, as stated more fully below.

7. As an initial matter, we will grant RCGI's request to reallot Station WQSF(FM) at different coordinates than those requested by Keymarket. It is Commission policy to attempt, where possible, to eliminate conflicts between coordinates specified by applicants and those specified by rulemaking proponents by modifying the rulemaking proposal to specify an alternate site or alternate channel when, as here, the rulemaking proposal would require a change in the authorized site of a facility. *See, e.g., Greenville, Texas*, 6 FCC Rcd 6048 (1991). Furthermore, our engineering analysis shows that a city grade signal can be provided to either Fort Lee or Mechanicsville from RCGI's proposed site. Accordingly, we will analyze this proposal based on the site proposed by RCGI.

8. We have determined that both of the proposed locations merit community status. We note that Mechanicsville's status as a community is not challenged. Indeed, Station WCDX(FM), Channel 221B1, which was the subject of the *First Report and Order* in this docket, is licensed to Mechanicsville. We find that Fort Lee is also a community for allotment purposes. Fort Lee is a Census Designated Place as defined by the U.S. Census, with a 1990 Census population of 6,895, which raises a strong presumption of community status. The fact that Fort Lee is a military installation does not preclude a finding that it is a community for allotment purposes. *See, e.g., Fort Rucker and Geneva, Alabama; Blakely, Georgia*, 5 FCC Rcd 37 (1990). We credit Keymarket's assertion that Fort Lee has defined boundaries, and that the U.S. Government provides it with separate police, fire, sanitation departments, and its own recreation facilities and libraries. Further, the facts that Fort Lee has a separate zip code, post office and newspaper[9] designated for Fort Lee further demonstrate its identification as a distinct location. Fort Lee has numerous social groups which address the social needs of the residents as a cohesive group, such as Fort Lee Ladies Golf Association, Fort Lee Youth Booster Club, American Society of Military Comptrollers, Lee Lepus Volksverband, and Traveller Riding Club, among others. Finally, Fort Lee contains the requisite commercial characteristics and institutions to distinguish it from the surrounding communities, such as a hospital, dental clinic, veterinary services, three separate chapels, a separate bank branch, credit union, commissary, movie theater, bowling alley, service station, beverage store, museum and "The Post Exchange", which contains a number of concessions. Therefore, we find that Fort Lee is a community.

9. Mechanicsville and Fort Lee are in the Richmond, and Petersburg, Virginia, Urbanized Areas, respectively, as defined by the U.S. Census. Pursuant to *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990), we will examine this proposal as proposing a twentieth transmission service to the Richmond Urbanized Area, or an eighth transmission service to the Petersburg Urbanized Area, rather than a second service to Mechanicsville or a first local service to Fort Lee. *See Bessemer and Tuscaloosa, Alabama*, 5 FCC Rcd 669 (1990)*recon. pending; Cf., RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990); *Faye and Richard Tuck*, 3 FCC

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[8] RCGI also argues that it should have been made a party to this proceeding because of the potential conflict between its application and the Mechanicsville proposal. Keymarket argues in opposition, and we agree, that its proposal fully protected the Bowling Green allotment pursuant to the Commission's Rules at the time of filing, and the Commission was under no obligation to make RCGI a party to this proceeding. Although we generally serve potentially affected applicants as a courtesy, there is no requirement that we do so. Section 1.401(d) requires only that licensees and permittees be served. Therefore, we were not required to serve RCGI in this matter.

[9] Capitol challenges Keymarket's characterization of the Fort Lee *Traveller*, as the local civilian published newspaper at Fort Lee. Capitol states that the paper, while published by a civilian entity, the Hopewell News, is actually an authorized publication for members of the Army at Fort Lee. We note that the exis-

Rcd 5374 (1988). Accordingly, we will examine this proposal pursuant to FM allotment priority four, other public interest matters.[10]

10. By the same token, we believe that Williamsburg must be considered for purposes of this analysis as part of the Norfolk-Virginia Beach-Newport News Urbanized Area, which has 31 transmission services. We note that for certain purposes, including changes of community of license, the location of a community within an urbanized area raises a substantial question with respect to the community's independence from the urbanized area. *See Bessemer and Tuscaloosa, Alabama, id.; Cf., RKO General, Inc. (KFRC), id.; Faye and Richard Tuck, id.* Although ABS's opposition argues that Williamsburg is an independent community, it does not present convincing evidence sufficiently dispositive of this issue. ABS's claims that Williamsburg is an incorporated community with its own government, taxes and municipal services, and that it has several industries, including tourism, are not in question. However, Williamsburg's proximity to the urbanized area[11] and population relative to the urbanized area diminish its relative independence. On the other hand, even if we determined that Williamsburg was not part of an urbanized area, we note that Stations WCWM(FM) and WMBG(AM) are both licensed to Williamsburg, and qualify as transmission services for purposes of the allotment priorities. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990); *Valley Broadcasters, Inc.*, 5 FCC Rcd 2785 (1990). Therefore, this proposal does not seek removal of the community's sole local transmission service.[12]

11. We believe that the change of community is warranted. Our analysis indicates that the Norfolk-Virginia Beach-Newport News Urbanized Area (population 1,323,098),[13] has 31 transmission services, the Richmond Urbanized Area (population 589,980), has 19 transmission services, and the Petersburg Urbanized Area (population 103,526), has 7 transmission services. Given the number of transmission services in the Norfolk-Virginia Beach-Newport News Urbanized Area, we do not believe that removal would significantly disrupt service to residents in the area. Furthermore, we note that Williamsburg will retain two local transmission services. Our analysis shows that the relocation of Station WQSF(FM)'s transmitter would result in the provision of an additional signal to over 205,306 persons. Some 156,609 persons currently in Station WQSF(FM)'s reception service area will lose the signal.[14] Although Capitol and Edens argue that 1,031 persons will be left with only 2 fulltime services if the change is granted, our analysis shows that the number is actually 520 persons, and the analysis also shows that no part of the gain or loss area receives less than 2 fulltime services. While we seriously consider any action that could result in the loss of a signal by people who have come to rely on that signal, we find in this case that the loss of a reception service in an extremely well served area, in order to provide reception service to a greater number of people, is warranted.

12. We find that the preferable community for the reallotment of Station WQSF(FM) in this matter is Fort Lee. In doing so, we consider Keymarket's willingness to serve either Mechanicsville or Fort Lee, and that the service area, identical in either instance, would provide a city-grade signal to either community. We consider that the Richmond Urbanized Area would receive its twentieth local service, and that Mechanicsville its second local transmission service. On the other hand, the Petersburg Urbanized Area would receive its seventh local and Fort Lee its first local transmission service. Therefore, we believe that a preferential arrangement of allotments would result by allotting the channel to Fort Lee.[15]

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 12, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Fort Lee, Virginia	243B
Williamsburg, Virginia	---

14. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Keymarket of Virginia, licensee of Station WQSF(FM), Channel 243B, Williamsburg, Virginia, IS MODIFIED to specify operation on Channel 243B, at Fort Lee, Virginia, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

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tence of a newspaper is not a dispositive factor in our determination of community status in this matter, nor do we place weight on the identity of the publisher of the newspaper.

[10] The FM allotment priorities are: (1) First full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters. [Co-equal weight would be given to priorities (2) and (3)] *Revision of FM Channel Policies and Procedures*, 90 FCC 2d 88, 91 (1982).

[11] The southeast border of Williamsburg is only 9.7 kilometers (6 miles) from the border of Newport News.

[12] We note that contrary to Edens' and Capitol's comments, Williamsburg is not an "underserved area." An underserved area is one which receives fewer than three *reception* services, not *transmission* services.

[13] Population figures are from the 1990 U.S. Census unless otherwise indicated.

[14] Using the site suggested in Keymarket's original proposal, the reception service gain area would have included 214,533 persons, and the reception service loss area would have included 180,199 persons.

[15] Channel 243B can be allotted at Fort Lee at a site 15.7 kilometers (9.8 miles) south of the community at reference coordinates 37-20-24 and 77-24-41. We note that these coordinates are different from those proposed in the *Notice* which are 37-25-30 and 77-32-00.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of of filing an environmental assessment to Section 1.1307 of the Commission's Rules.

15. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Report and Order*, to the following:

James M. Weitzman, Esq.
Kaye, Scholer, Fierman, Hays & Handler
901 Fifteenth Street, N.W. Suite 1100
Washington, D.C. 20005
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P.O. Box 539
McLean, VA 22101
(Counsel to Rappahannock Communications Group, Inc.)

16. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

17. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell

Petition for Waiver of Part 69 of
the Commission's Rules

ORDER

Adopted: September 18, 1992; Released: September 22, 1992

By the Chief, Common Carrier Bureau:

1. On July 24, 1992, Pacific Bell (Pacific) filed a petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish three new rate elements to recover the costs associated with its "Electronic Directory Listing Service" (Electronic Directory). Pacific Petition at 1. This service would permit Pacific customers or customers' end users to access electronic directory listings without operator interaction or reference to printed white pages. Pacific's Electronic Directory service would provide access to a host database through which users could obtain the telephone numbers and addresses of telephone subscribers in Pacific's service areas by conducting an alphanumeric name search.[1] *Id.* at 2. Pacific states that non-published information and listings designated for directory assistance only will not be included in the database. *Id.*

2. According to Pacific, the rate structure for its Electronic Directory service will consist of recurring and non-recurring elements. A usage charge will recover the recurring investment and related expenses; non-recurring charges will recover the costs associated with the establishment of service and user IDs. *Id.* at 3. Pacific further states that this service does not differ in any material respect from the electronic directory assistance services offered by other local exchange carriers and for which the Commission has already granted waivers. *Id.* at 4. Pacific's waiver petition is unopposed.

3. Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, provides that waiver petitions may be granted if "good cause therefor is shown." We have previously considered almost identical waiver requests from other local exchange carriers.[2] We granted those requests because we found that "[a]lthough electronic directory assistance serves the same function as operator directory assistance, the costs of this service will differ from those associated with the more traditional directory assistance service." The Bureau stated that "[a] distinct charge to recover the unique costs of electronic directory assistance from only the users of this service would, therefore, be more consistent with the Commission's cost causation policies."[3] There is no material difference between the electronic directory assistance services offered by these carriers and Pacific's Electronic Directory service which is the subject of this waiver request.[4] Thus, good cause exists to permit Pacific to establish separate rate subelements for its Electronic Directory Listing Service and, therefore, we grant the waiver.

4. Accordingly, IT IS ORDERED that the petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, filed by the Pacific Bell telephone companies, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[1] Pacific states that "[s]earch criteria will initially be limited to alphanumeric name searches..." and that the user will have to input, at a minimum, the telephone subscriber's last name, locality and area code. *Id.* at 3. We conclude from this statement that Pacific's Electronic Directory service will not include "reverse search" capability, the ability to locate a name in the database by entering the associated telephone number.

[2] *See*, Southwestern Bell Telephone Company, Petition for Waiver of Section 69.4(b) of the Commission's Rules, Order, 5 FCC Rcd. 3792 (Com.Car.Bur. 1990) (*SWB Order*); US West Communications, Petition for Waiver of Part 69 of the Commission's Rules to Provide Electronic White Pages Service, Order, 5 FCC Rcd. 5526 (Com.Car.Bur. 1990); Ameritech Operating Companies, Petition for Waiver of Part 69 of the Commission's Rules for Electronic Directory Assistance Service, Order, 5 FCC Rcd. 7120 (Com.Car.Bur. 1990); Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company, Petition for Waiver of Part 69 of the Commission's Rules for Electronic White Pages Service, 5 FCC Rcd. 7121 (Com.Car.Bur. 1990); New England Telephone and Telegraph Company and New York Telephone Company, Petition for Waiver of Part 69 of the Commission's Rules for Electronic Directory Assistance Service, 5 FCC Rcd 7122 (Com.Car.Bur. 1990); Bell Atlantic Telephone Companies, Petition for Waiver of Part 69 of the Commission's Rules for Electronic Directory Assistance Service, Order, 6 FCC Rcd 971 (Com.Car.Bur. 1990).

[3] *See, e.g., SWB Order*, 5 FCC Rcd. at 3793.

[4] Our conclusion applies to the service described by Pacific in this transmittal. We express no opinion as to the proper regulatory status of "reverse search" directory assistance.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 4418
Tariff F.C.C. No. 1

ORDER

Adopted: September 21, 1992; Released: September 21, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On September 8, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective September 22, 1992, on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing reintroduces promotional compensation for call acknowledgement, but not call information, into AT&T's Dial-It 900 Service.

2. On September 15, 1992, Electronic Town Meeting, Inc. (ETMI) filed a petition to reject or suspend and investigate Transmittal No. 4418.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4418 and ETMI's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 4418, filed by Electronic Town Meeting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Report No. DS-1231

Released: September 29, 1992

GUIDELINES FOR FILING DOMESTIC SATELLITE EARTH STATION APPLICATIONS

This Public Notice revises Report No. DS-1202 (7 FCC Rcd 3600 (1992)) and is intended to provide applicants with information that will increase the likelihood of filing successful earth station applications. Incomplete and incorrect applications result in processing delays for applicants, and increased work for the Satellite Radio Branch staff. References below are from 47 C.F.R. Part 2 and 25 of the FCC Rules and Regulations.

1. Form 493 should be properly and completely filled out, signed and dated. In order to answer Question No. 25 for transmitting earth stations, see attached Radiation Evaluation Guidelines. (§ 25.110-119)

2. All technical exhibits should be complete.

3. Earth stations should be in compliance with all FCC technical requirements. (§ 25.201-300)

4. Emission designators should be in new format and correct. (§ 2.201-202)

5. Antenna location information should be clear: if antenna is located on a building, a sketch with heights should be included. (§ 25.111)

6. If earth station contains more than one antenna, a site sketch is required. (§ 25.111)

7. At 4/6 GHz, frequency coordination with terrestrial systems should not be more than six months old.

8. At 12/14 GHz, no frequency coordination with terrestrial systems should be filed since the Fixed Satellite Service is the only primary service allocated in these bands in the United States.

9. No receive-only earth station applications in the 11.7-12.2 GHz band will be accepted.

10. Form 430 is required with initial application for a transmit station. (§ 25.115)

11. An original and two copies of application should be filed for any new station or modification. (§ 25.110)

12. For assignment and transfer applications, an original and two copies should be filed; for applications with more than one call sign, an original and one copy should be filed for each additional call sign included in application.

13. An original and five copies of application are required for initial VSAT network applications.

14. Form 493 should be used for modification applications, showing only those parameters that are being changed or added (clearly distinguishing changes from additions). (§ 25.117)

15. Amendments should include applicant name, call sign, and file number of pending application.

Radiation Evaluation Guidelines
FCC Satellite Radio Branch

When applying for a license to construct and operate an earth station, licensees must certify whether grant of the application may have a significant environmental impact as defined in Section 1.1307 of the Commission's rules, 47 C.F.R. § 1.1307. (Question No. 25, FCC Form 493.) In making this determination, the applicant must determine whether (1) the proposed facility is categorically deemed to have a potential significant effect (Section 1.1307(a)) or (2) whether the guidelines for radiofrequency radiation levels are exceeded (Section 1.1307(b)). If either of these determinations are affirmative, the applicant must submit an environmental assessment (EA) with its application (Section 1.1308 and 1.1311).

In order for an applicant to make a proper certification with respect to radiofrequency radiation levels, the applicant should prepare a radiation hazard study in advance of filing its application. The reference document for performing the radiation evaluation is OST Bulletin No. 65. The title of the bulletin is "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," October, 1985. It is available from the National Technical Information Service, 1-800-553-NTIS, and the order number is PB 86-127081. The radiation evaluation should consider the contributions to power density levels of any nearby non-categorically excluded transmitters that could add significantly to potential exposure levels. Non-categorically excluded facilities and operations are defined in § 1.1307(b) and include AM and FM radio stations, television stations, LPTV or TV translator stations, FM Booster stations with ERP in excess of 100 watts, ITFS, MDS, or MMDS stations with EIRP in excess of 200 watts, experimental stations, and other satellite earth stations. Any non-categorically excluded station (as defined in § 1.1307(b)) that contributes less than 1% of the applicable RF exposure limit at the uplink site in question would not be considered as a "nearby" transmitter and need not be considered in the engineering study.

We have provided an example of a radiation hazard study below. If there are no potential hazards and no applicable limits are exceeded (and if the facility is not categorically included in Section 1.1307(a)), the applicant may certify no significant environmental effect on FCC Form 493. If there is a potential hazard, applicants must submit an EA containing a summary table and a conclusion paragraph similar to the example below. If an applicant certifies no significant effect and the facility is found, upon staff review, to exceed the applicable radiofrequency radiation guidelines, the Commission may request the licensee to submit its radiation hazard study. The licensee may also be subject to forfeiture if there has been a misrepresentation or lack of candor in its application, pursuant to Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), recon. pending.

FEDERAL COMMUNICATIONS COMMISSION

Summary Table

Region	Radiation Level (mW/cm^2)	Hazard Assessment
Far Field, Rf = 620 m	1.0	Complies with Guidelines
Near Field, Rn = 255 m	3.5	Complies with Guidelines
Transition Region, Rt Rn < Rt < Rf	< 3.5	Complies with Guidelines
Between Main Reflector and Subreflector	94.0	**Potential Hazard**
Reflector Surface	2.1	Complies with Guidelines
Between Antenna and Ground	0.9	Complies with Guidelines

CONCLUSION: Based on the above analysis it is concluded that harmful levels of radiation will not exist in regions normally occupied by the public or the earth station's operating personnel. The earth station will be marked with the standard radiation hazard warnings, on the antenna itself, warning personnel to avoid the area in front of the reflector when the transmitter is operational. To ensure compliance with the safety limits, the earth station transmitter will be turned off whenever maintenance and repair personnel are required to work in an area where the radiation level exceeds the level recommended by applicable guidelines. Additionally, the earth station is secured and access is controlled.

Before the
Federal Communications Commission
Washington D. C. 20554

In the Matter of

GTE Service Corporation AAD 92-48
and its Affiliated Domestic Telephone
Operating Companies

Petition for Waiver of Sections 1.785,
43.21, and 43.22 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: September 18, 1992; Released: September 21, 1992

By the Chief, Accounting and Audits Division:

1. On June 29, 1992, GTE Service Corporation and its affiliated domestic telephone operating companies (GTE) filed a petition for waiver of the Commission's rules regarding requirements for various filings in the Commission's computerized data system, ARMIS.[1] We placed this petition on public notice on July 16;[2] the United States Telephone Association (USTA) filed comments in support of the request on August 10, 1992.

2. GTE states that it has discovered certain anomalies in filings made by Contel prior to the Contel-GTE merger, and, while GTE intends to correct these anomalies prospectively, it seeks waivers to excuse it from making corrections to past filings. Specifically, GTE states that Contel of California consists of three study areas (California - COCA, Arizona - COAZ, and Nevada - CONV), but that Contel has filed only for COCA. GTE intends to provide filings for each study area prospectively, but asks to be excused from filing correctively for past periods.

3. Further, GTE notes that in Missouri Contel has three separate legal entities (Contel of Missouri, Contel Systems of Missouri, and Contel of Eastern Missouri), only one of which is a Class A company and subject to ARMIS, but all of which have been included in Contel's Contel of Missouri - COMO filings. GTE intends to file for COMO only (excluding data from the other two study areas) prospectively, but asks to be excused from filing correctively for past periods.

4. Finally, GTE states that Contel of New York consists of three study areas (New York/Upstate, New York/Red Hook, and New York/Western Counties and Delaware), all of which have filed consolidated data as Contel of New York. GTE intends to file for the three separate study areas prospectively, but asks to be excused from filing correctively for past periods.

5. GTE states that Contel did not maintain in its reporting systems the data as required by the rules, and that it would be difficult and expensive, if not impossible, to try to recreate prior period data. Further, GTE states, these past reporting errors have had no impact on any of the data contained in Contel's Tariff Review Plans previously filed with the Commission, and Form 492 rate of return results are not affected by these changes.

6. We find that GTE's waiver request is as narrowly drawn as possible, and is fully supported. We recognize that the GTE/Contel merger has produced or revealed a number of difficulties, among them the anomalous filing patterns discussed here. We find that GTE has offered adequate assurance that its filings will be correct on a going-forward basis. We are persuaded that the filing errors made by Contel have had minimal impact, and that the impact of correction filed now would be similarly insignificant. Further, GTE has stated that a requirement to reconstruct and correct Contel's historical data would impose substantial burden, or even impossibility. Finally, GTE assures that its current and future filings for these entities will be made in full compliance with our rules. We are satisfied that GTE has adequately justified the waiver it seeks.

7. Accordingly, IT IS ORDERED that the petition filed by GTE Service Corporation and its Affiliated Domestic Telephone Operating Companies for waiver of Sections 1.785, 43.21, and 43.22 of the Commission's rules, 47 C.F.R. §§1.785, 43.21, and 43.22, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

[1] *See generally* Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the Commission's Rules), CC Docket No. 86-182, Report and Order, 2 FCC Rcd 5770 (1987), *recon.* 3 FCC Rcd 6375 (1988), *further recon.* 4 FCC Rcd 8240 (1989). GTE seeks waiver of Section 1.785, 47 C.F.R. §1.785 (requiring; Section 43.21, 47 C.F.R. §43.21 (requiring; and Section 43.22, 47 C.F.R. §43.22 (requiring).

[2] Public Notice, AAD 92-48, DA 92-906, released July 16, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

First Class Radiotelegraph Operator's Certificate T1-HQ-4271 — NAL/Acct. No. 215HF0016

Joseph Sawchuk, IV
Marion, North Carolina

NOTICE OF APPARENT LIABILITY

Adopted: September 21, 1992; Released: September 29, 1992

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for monetary forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §503(b), to Joseph Sawchuk, IV, for aiding and abetting the willful and repeated violation of Section 353(b) of the Act, 47 U.S.C §353(b), in violation of Section 13.62 of the Commission's Rules, 47 C.F.R. §13.62.

2. Pursuant to the Commission's policies and standards for assessing forfeitures, it appears that the appropriate amount of forfeiture for this violation would be $10,000.

II. BACKGROUND

3. Section 353(b) of the Act, and 80.159(b) of the Rules, 47 C.F.R. §80.159(b), establish certain radio operator requirements designed to maintain a distress and safety communications net for vessels at sea.[1] It appears that Mr. Sawchuk sailed as sole Radio Officer aboard the motor vessel PATRIOT (call sign KGBQ, official number 571049) prior to receiving a Six Months Service Endorsement to his First Class Radiotelegraph Operator's Certificate (Number T1-HQ-4271). Mr. Sawchuk's action placed the ship's radio station, KGBQ, in violation of Section 80.159(b) of the Commission's Rules, and Section 353(b) of the Act.

4. Mr. Sawchuk was the sole Radio Officer aboard the vessel while it travelled from Yokosuka, Japan, to Yanbu, Saudi Arabia, and then to Diego Garcia, B.I.O.T., between October 1, 1991, and November 5, 1991, as evidenced by a July 8, 1992, letter from Vulcan Carriers, Ltd, the station licensee.

5. Also, the radio logs that Mr. Sawchuk submitted with his endorsement application indicate that he sailed again as sole Radio Officer aboard the PATRIOT when it sailed in the open sea from Diego Garcia on January 19, 1992, to the west coast of Saudi Arabia (latitude 21-14 north, longitude 37-51 east), and then back to Diego Garcia, arriving on February 9, 1992.

III. DISCUSSION

6. Section 13.62 of the Rules prohibits commercial radio operators from causing, aiding, or abetting the violation of the Act, any treaty, or convention, or Commission regulation established pursuant to the Act, or such treaty, or convention. Mr. Sawchuk has violated Section 13.62 of the Commission's Rules by causing the ship upon which he served as sole Radio Officer to be in violation of Section 80.159(b) of the Commission's Rules.

7. The violation was willful and repeated in that the action of sailing was intentional and comprised at least four individual departures for voyages in the open sea.

8. Under our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, FCC 92-212, 57 Fed. Reg. 24,986 (June 12, 1992), the base amount for a violation related to distress and safety frequencies such as the maritime service is $8,000. Since the violation was repeated, the appropriate amount would be $16,000. Because Mr. Sawchuk has not previously received a Commission sanction for a violation of the Commission's Rules, we are taking into consideration his history of overall compliance with Commission requirements and reducing the forfeiture amount for the apparent violation to $10,000.

IV. OERDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. §1.80, that Joseph Sawchuk, IV, IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $10,000 for causing, aiding, and abetting a violation by ship station KGBQ aboard the vessel PATRIOT of Section 80.159(b) of the Commission's Rules. In so doing he has violated Section 13.62 of the Commission's Rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

10. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. §1.80, that Joseph Sawchuk, IV, shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any written response must include a detailed factual statement and supporting documentation.[2] Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. The remittance should be marked "NAL/Acct. No. 215HF0016" and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Attn: NAL/Acct. No. 215HF0016
Stop Code 1500E3
1919 M St., N.W.
Washington, D.C. 20554

11. IT IS FURTHER ORDERED that this notice shall be sent, by certified mail, to Joseph Sawchuk, IV, 525 Forest Heights, Marion, North Carolina 28307.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

FOOTNOTES

[1] These provisions require that each cargo ship equipped with a radiotelegraph station in accordance with Part II of Title III of the Communications Act, and which has a radiotelegraph auto alarm, must carry a Radio Officer "who shall have had at least six months previous service in the aggregate as a radio officer in a station on board a ship or ships of the United States." *See* Section 353(b) of the Act, 47 U.S.C. §353(b) and Section 13.12(b), 47 C.F.R. §13.12(b). The Commission currently requires that Radio Officers obtain an Endorsement to their First or Second Class Radiotelegraph Operator's Certificate as evidence of the six-months service. *See In the Matter of Amendments of Parts 13 and 80 of the Rules Concerning Ship Radio Officer Qualifying Service Endorsements*, 3 FCC Rcd 6361 (1988).

[2] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 29, 1992

PACIFIC BELL FILES REVISIONS TO ITS COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

On September 17, 1992, Pacific Bell (Pacific) filed proposed revisions to its cost allocation manual for the separation of regulated and nonregulated costs. These revisions relate to Pacific's Enhanced Time Distribution Process (ETDP). ETDP is a new time reporting process in which Pacific uses a statistically valid sampling technique to augment positive time reporting procedures for field technicians. In an order released June 19, 1992, the Common Carrier Bureau approved Pacific's use of ETDP subject to certain conditions.[1] In its filing of September 17, Pacific indicates that it is in compliance with these conditions and requests final approval of its CAM revisions related to ETDP. The revisions filed on September 17 contain a modification to the procedures approved on June 19.

Parties may file comments on the proposed revisions to Pacific's manual no later than **October 29, 1992.** Replies should be filed by **November 13, 1992.** Comments should reference AAD 92-69. A copy of each pleading should be sent to Ed Dashkin, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and the Downtown Copy Center (DCC), 1990 M Street, N.W., Suite 640, Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Ed Dashkin (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

[1] *See* Pacific Bell's Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, *Memorandum Opinion and Order*, 7 FCC Rcd 3917 (Com. Car. Bur., 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRAC COMMUNICATIONS, INC., and
MOBILTRONICS, INC.,
Complainants,

v. File No. E-89-36

DETROIT CELLULAR TELEPHONE COMPANY,
Defendant.

In the Matter of

TRAC COMMUNICATIONS, INC., and
MOBILTRONICS, INC.,
Complainants,

v. File No. E-89-37

DETROIT SMSA LIMITED PARTNERSHIP,
and AMERITECH MOBILE COMMUNICATIONS,
INC.,
Defendants.

ORDER

Adopted: September 18, 1992; Released: September 29, 1992

By the Chief, Common Carrier Bureau:

1. November 4, 1988, TRAC Communications, Inc. and Mobiltronics, Inc. (complainants) filed the above-captioned complaints against, *inter alia*, Detroit Cellular Telephone Company and Detroit SMSA Limited Partnership, the cellular licensees in the Detroit, Michigan market (defendants). Complainants allege, *inter alia*, that defendants violated Commission policy by furnishing cellular terminal equipment (CPE) in a bundled offering with their respective cellular transmission services. Complainants seek a cease and desist order directed against these practices. Defendants deny that the practices complained of were unlawful and have moved to dismiss the complaints for failure to state a claim on which relief can be granted.[1]

2. On June 10, 1992, the Commission released its Report and Order in CC Docket No. 91-34, in which it clarified its cellular bundling policy. *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028 (1992), *petition for reconsideration filed* (*Cellular Bundling Order*). The Commission concluded that it is in the public interest "to allow cellular CPE and cellular service to be offered on a bundled basis, provided that the cellular service is also offered separately on a nondiscriminatory basis." *Id.* at 4029. It reaffirmed its dismissal of a petition for declaratory ruling filed on December 23, 1988 by the National Cellular Resellers Association (NCRA), which had sought essentially the same kind of relief that complainants request in the subject proceedings. The Commission found no warrant for granting the relief NCRA had requested. *Id.* at 4035, n.54.

3. We have carefully examined the record in these proceedings in light of the Commission's clarification of its policy in the *Cellular Bundling Order*. We conclude that complainants' request for issuance of a cease and desist cannot be granted. Such prospective relief would not be in the public interest given the recent findings and conclusions of the *Cellular Bundling Order*. Indeed, issuance of the requested cease and desist order would contravene that order.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the above-captioned complaints filed November 4, 1988 by TRAC Communications, Inc. and Mobiltronics, Inc., and the motions to dismiss filed on December 9, 1989 by Detroit Cellular Telephone Company and jointly by Detroit SMSA Limited Partnership and Ameritech Mobile Communications, Inc., ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] Under Section 208(a) of the Communications Act, 47 U.S.C. § 208(a), and 47 C.F.R. § 1.721(a)(4), a complainant must show that a carrier acted in contravention of a provision of the Act or of a Commission order or rule. TPI Transmission Services, Inc. v. Puerto Rico Telephone Co., 4 FCC Rcd 2246, 2248 n.18 (Com. Car. Bur. 1989), *review denied*, 4 FCC Rcd 6479 (1989) (in complaint proceeding, burden of proof lies with complainant to show violation of Act or Commission rule); *see* 1.728(a) (purported formal complaint that does not state cause of action will be dismissed). In view of our action herein, it is not necessary to determine whether complainants met their burden under the Communications Act and the Commission's rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telephone Companies — Transmittal No. 435

Revisions to Tariff F.C.C. No. 4

MEMORANDUM OPINION AND ORDER

Adopted: August 18, 1992; Released: September 30, 1992

By the Commission:

I. INTRODUCTION

1. On October 29, 1991, the BellSouth Telephone Companies (BellSouth) filed Transmittal No. 435 to specify that Calling Party Number (CPN),[1] currently available in all BellSouth states through the carrier's interstate access tariff, would be withdrawn in North Carolina. BellSouth indicated it would not again offer CPN to North Carolina subscribers until the North Carolina Utilities Commission (NCUC) resolved certain designated privacy issues regarding the delivery of CPN. The Common Carrier Bureau rejected Transmittal 435 on the grounds that BellSouth failed to obtain Commission authority to discontinue a service as required by Section 214(a) of the Communications Act, 47 U.S.C. § 214(a).[2]

2. On March 2, 1992, BellSouth filed an application for review of the *January 31 Order* arguing that it is not required to obtain authority under Section 214(a) to discontinue CPN in North Carolina. For the reasons discussed below, we deny BellSouth's application for review.

II. BACKGROUND AND PLEADINGS

3. In its application for review, BellSouth argues that the withdrawal of CPN does not constitute a discontinuance of service within the meaning of Section 214(a) of the Act.[3] First, BellSouth states that the Commission has defined "community," for purposes of Section 214(a), to mean the "using public." It argues that the only customers currently using CPN in North Carolina are carrier-customers, such as American Telephone and Telegraph Company (AT&T), which are not considered the "using public." Therefore, says BellSouth, Transmittal 435 is not a discontinuance of service to the "using public" and Section 214(a) does not apply. BellSouth Application at 3.[4] Second, BellSouth argues that CPN is a not a service within the meaning of Section 214(a). It states that CPN is an optional feature of switched access service which cannot be offered or obtained independent of switched access service. *Id.* at 3. Therefore, BellSouth contends, CPN, as an individual component of switched access, does not constitute a separate service requiring discontinuance authorization. *Id.* Finally, BellSouth argues that it has withdrawn common switching options in the past without the Commission determining Section 214(a) authority to be necessary. *Id.* at 4-5.

4. On March 17, 1992, AT&T filed an opposition to BellSouth's application for review.[5] AT&T states it disagrees Transmittal 435 on Section 214 grounds. It argues that the Commission should uphold the rejection of BellSouth's tariff on the alternative ground that the withdrawal of CPN from its interstate access tariff pending resolution of state privacy issues is unlawful. AT&T Opposition at 2-3. BellSouth, says AT&T, cannot degrade its existing services by withdrawing CPN solely to accommodate the concerns of a state utility commission. *Id.*

III. DISCUSSION

5. BellSouth first argues that Section 214 authorization is not required to discontinue CPN in North Carolina because it is not discontinuing CPN to the public, but only to its carrier-customers. BellSouth is incorrect. The Commission has considered carrier-to-carrier interconnection services to be subject to the requirements of Section 214(a) in certain circumstances.[6] If, for example, a discontinu-

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[1] CPN is used by interexchange carriers (IXCs) to provide so-called "caller ID" services which, in conjunction with the appropriate customer premises equipment, permit the called party to identify the ten-digit station number of the calling party. BellSouth's CPN service transmits the calling party's station number to the IXC.

[2] BellSouth Telephone Companies, Transmittal No. 435, 7 FCC Rcd 1426 (Com.Car.Bur. 1992) (*January 31 Order*).

[3] Section 214(a) states,

> No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby....

[4] *Citing* Western Union Telegraph Co., 74 FCC 2d 293, 296 (1979).

[5] AT&T had previously filed a petition to reject Transmittal 435, arguing that BellSouth's effort to withdraw CPN in North Carolina was unreasonable because it conditioned the provision of interstate service on action in a state regulatory proceeding. AT&T Petition at 2. AT&T asserted that the Commission has exclusive authority to regulate interstate communications and BellSouth's attempt to degrade its interstate access service by restricting CPN was contrary to federal law. *Id.* at 2-3. BellSouth replied to AT&T that Transmittal 435 was an interim measure pending resolution of interstate CPN issues in the Commission's CPN rulemaking. BellSouth Reply at 2, *citing* Rules and Policies Concerning Caller Number Identification Service, Notice of Proposed Rulemaking, CC Docket No. 91-281, 6 FCC Rcd 6752 (1991).

[6] Western Union Telegraph Company, 74 F.C.C. 2d 293, 296 (1979), *citing* ITT World Communications v. New York Telephone Co., 381 F. Supp. 113 (D.C.N.Y. 1974). *See also* Section 63.62(b) of the Commission's Rules, 47 C.F.R. Section 63.62(b), which defines the types of discontinuance, reduction, or impairment of service requiring Section 214 authorization as the "severance of physical connection or the termination or suspension of the interchange of traffic with another carrier."

ance, reduction, or impairment of service to the carrier-customer ultimately discontinues service to an end user, the Commission has found that § 214(a) requires the Commission to authorize such a discontinuance.[7] In the case of Transmittal 435, AT&T has ordered CPN under BellSouth's interstate tariff for North Carolina as part of its interstate 800 and 900 INFO-2 and Virtual Private Network Services. If Transmittal 435 had become effective, AT&T's interstate customers would have lost their ability to obtain CPN as part of their interstate services.[8] We therefore conclude that a Section 214(a) evaluation is necessary to determine if the impairment of service to these end users will adversely affect the present or future public convenience or necessity.

6. BellSouth also argues that Section 214(a) authority is not required in this instance because CPN is not, itself, a service within the meaning of that section. We disagree. Although BellSouth has included CPN in its interstate switched access tariff, we find that it constitutes a separate interstate offering, rather than some integrated technical feature of switched access service, because BellSouth's tariff permits customers to order switched access with or without CPN. Thus, BellSouth must file an application seeking Section 214 authorization before it discontinues CPN in North Carolina. In the proceeding on that application, the Commission will evaluate BellSouth's arguments for discontinuance and the impact of such discontinuance on end users.[9]

IV. CONCLUSION AND ORDERING CLAUSE

7. We conclude that Section 214(a) is applicable to BellSouth's attempt to withdraw CPN in North Carolina. Accordingly, we affirm the Bureau's finding that BellSouth must obtain the approval required by this section of the Act if it intends to cease offering CPN to its interstate customers in North Carolina.[10]

8. Accordingly, IT IS ORDERED that the application for review filed by BellSouth Telephone Companies, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[7] Western Union Telegraph Company, 74 F.C.C. 2d at 296.

[8] *See* AT&T Opposition at 5.

[9] BellSouth maintains that the Bureau has permitted it to withdraw common switching options in the past, such as DS4 high capacity service and various pulse signalling options in its Feature Group C, without finding Section 214 authority to be a prerequisite. BellSouth Application at 5. We note that unlike other types of tariffed service options for which Section 214 authorization may or may not be required, CPN is the subject of a Notice of Proposed Rulemaking in which the Commission tentatively concluded that it is in the public interest to formulate a federal policy to promote the availability of interstate CPN service. *See* Rules and Policies Regarding Calling Number Identification Service, Notice Of Proposed Rulemaking, CC Docket No. 91-281, 6 FCC Rcd 6752, 6754 (1991).

[10] In light of our decision, we need not address AT&T's arguments. We note, however, that the Commission has not yet addressed whether state regulation of CPN or "caller ID" is preempted. That issue would be decided, if at all, in the context of a Section 214 discontinuance request. *See* 47 U.S.C. §§ 154(i), 214(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FIRST PHONE OF
NEW ENGLAND, INC.,
Complainant,

v. File No. E-90-310

THE OHIO BELL
TELEPHONE COMPANY,
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: September 21, 1992; Released: September 30, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, First Phone of New England, Inc. (First Phone) filed the above-captioned complaint against defendant seeking damages resulting from the defendant's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On September 14, 1992, however, First Phone filed a motion to dismiss the complaint with prejudice stating that the continuance of the proceeding was economically unjustifiable.

2. We are satisfied that granting First Phone's motion to withdraw the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that First Phone's Motion to Dismiss with Prejudice IS GRANTED and the proceeding IS TERMINATED.

4. IT IS FURTHER ORDERED that First Phone's Application for Review filed in the above-captioned proceeding IS DISMISSED.

[1] First Phone filed an application for review of an order holding the above-captioned proceeding in abeyance. *Order*, 6 FCC Rcd 661 (Com.Car.Bur. 1991). Because the complainant has withdrawn the complaint, the application for review is moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FIRST PHONE OF
NEW ENGLAND, INC.,
Complainant,

v.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-303
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	File No. E-90-304
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-305
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-306
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-307
THE DIAMOND STATE TELEPHONE COMPANY, and	File No. E-90-308
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-309
Defendants.	

ORDER

Adopted: September 21, 1992; Released: September 30, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, First Phone of New England, Inc. (First Phone) filed the above-captioned complaints against defendants seeking damages resulting from the defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On September 14, 1992, however, First Phone filed a motion to dismiss the complaints with prejudice stating that a mutually agreeable settlement of all pending controversies has been reached.

2. We are satisfied that granting First Phone's motion to dismiss the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that First Phone's Motion to Dismiss with Prejudice IS GRANTED and the proceedings ARE TERMINATED.

4. IT IS FURTHER ORDERED that First Phone's Application for Review filed in the above-captioned proceedings IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[1] First Phone filed an application for review of an order holding the above-captioned proceeding in abeyance. *Order*, 6 FCC Rcd 661 (Com.Car.Bur. 1991). Because the underlying dispute has been resolved by agreement between the parties, the application for review is moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTERAMERICAN TELEPHONE CO. — File No. I-T-C-92-173

Application for authority to operate as an international resale carrier.

INTERNATIONAL DIALING GATEWAY, INC. — File No. I-T-C-92-199

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 22, 1992; Released: September 30, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public on a resale basis by Interamerican Telephone Co. (ITC), and International Dialing Gateway, Inc. (IDG).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-173 and I-T-C-92-199 ARE GRANTED; and

a. ITC is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the international points listed in those tariffs; and

b. IDG is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, and US Sprint's Tariff F.C.C. No. 1 between the U.S. and the international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI INTERNATIONAL, INC. File No. I-T-C-92-145

Application for authority
Pursuant to Section 214 of the
Communications Act of 1934,
as amended, to acquire
and operate circuits and
connecting satellite
facilities for use in
the provision of IBS
services between Guam
and points in the Pacific
Ocean Region

MEMORANDUM, OPINION, ORDER AND AUTHORIZATION

Adopted: September 18, 1992; Released: September 30, 1992

By the Chief, International Facilities Division:

1. On April 7, 1992, MCI International, Inc. (MCI), filed an application pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules for authority to acquire and operate satellite circuits for the provision of International Business Satellite (IBS) services between Guam and certain foreign points via appropriate communications satellites over the Pacific Ocean Region (POR). The application was placed on public notice on April 15, 1992, and no oppositions were received.

2. Specifically, MCI requests authority to acquire by lease from Communications Satellite Corporation (Comsat) and operate up to 118 satellite circuits through 1996 between the Pulantat-3 and/or Pulantat-2 earth stations located on Guam and an appropriate communications satellite or satellites over the POR, to be interconnected with matching circuitry between the satellite or satellites and an earth station at the following points:

Australia	Malaysia
China	Palau
Federated States of Micronesia	Saipan
Hawaii	New Zealand
Hong Kong	Singapore
Indonesia	Taiwan
Japan	U.S. Mainland
Korea	

3. MCI also requests authority to establish, activate and operate the above POR satellite circuits for the provision of direct service between points in or reached via Guam and the countries listed above; and to lease and operate (a greater or lesser number of satellite circuits and necessary terrestrial connecting facilities for each of the points specified above, provided that MCI shall not lease and operate more than the total number of IBS circuits requested with the requisite terrestrial connecting facilities for the provision of communications services from Guam to all points listed above. MCI proposes to furnish its authorized services in accordance with its tariff charges and regulations on file or to be filed with the Commission. It also states that accounting will be in accordance with the Commission's Rules.

4. MCI has been declared dominant by the Commission insofar as it serves Guam.[1] Therefore, when we allowed MCI to construct and operate the Pulantat-3 earth station, we conditioned its authorization with the requirement that MCI provide access to International Digital Route (IDR) service on a tariffed, non-discriminatory basis to all authorized users under just and reasonable charges.[2] In particular, we required MCI to file a tariff before it could provide IDR service via the Pulantat-3 earth station.

5. We conclude that it will be in the public interest to grant MCI authority to acquire and operate satellite circuits for the provision of IBS services between Guam and the above-listed points via appropriate communications satellites over the POR. However, to ensure that other authorized users have equitable access to IDR service, we remind MCI that prior to commencing IDR service for itself or others, it must file and have approved by the Commission a tariff for such service.

6. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. Section 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. Section 63.01, that application File No. I-T-C-92-145 IS GRANTED and MCI is authorized:

(1) to acquire by lease from Comsat and operate up to 118 IBS circuits through 1996 between the Pulantat-3 and/or Pulantat-2 earth stations located on Guam and an appropriate communications satellite or satellites over the POR, to be interconnected with matching circuitry between the satellite or satellites and an earth station at the points listed in paragraph 2, *supra;*

(2) to use the IBS circuits authorized above for the provision of IBS services between Guam and the points listed in paragraph 2, *supra;* and

(3) to lease and operate a greater or lesser number of satellite circuits and necessary terrestrial connecting facilities for each of the points specified above, provided that MCI shall not lease and operate more than the total number of IBS circuits requested with

[1] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986).
[2] MCI International, Inc., 7 FCC Rcd 2215 (1992).

the requisite terrestrial connecting facilities for the provision of IBS from Guam to all points listed above.

7. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that before MCI provides IDR services via the Pulantat-3 earth station, it shall file and have in effect a tariff for the provision to other carriers of equitable access to the Pulantat-3 earth station for IDR service.

8. IT IS FURTHER ORDERED that the Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure non-discriminatory use of, and equitable access to, the communications satellite system.

9. IT IS FURTHER ORDERED that any authorization of MCI to provide private lines is limited to the provision of such private lines only between the United States and the points listed in paragraph 2 -- that is, private lines which originate in the United States and terminate in the points listed in paragraph 2 or which originate in the points listed in paragraph 2 and terminate in the United States. In addition, MCI may not -- and MCI's tariff must state that MCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the countries listed in paragraph 2 afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *petitions for reconsideration pending*.

10. IT IS FURTHER ORDERED that neither MCI nor any persons or companies controlling or controlled by MCI shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territory or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

11. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATIONS SERVICES, INC. — FOIA Control No. 92-266

Freedom of Information Act Request

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 1992; Released: August 3, 1992

By the Commission:

1. The Commission has under consideration an Application for Review filed on March 9, 1992, by Allnet Communications Services, Inc. (Allnet), appealing a February 7, 1992 Freedom of Information Act (FOIA) decision by the Chief, Common Carrier Bureau.[1] For the reasons discussed herein, we affirm the Bureau's ruling that the materials in question are not required to be disclosed publicly under the FOIA.

BACKGROUND

2. By FOIA request dated January 6, 1992, Allnet sought access to all of the Bell Operating Companies' (BOCs) Switching Cost Information System (SCIS) models and all associated data which has been filed with the Commission. SCIS is a computer model developed and maintained by Bellcore and used by the BOCs to apportion joint and common switching costs between individual Basic Service Elements (BSEs) for Open Network Architecture (ONA) implementation. The model is used to determine the switch investment associated with each BSE as a component of direct cost.[2] The Bureau previously had determined that the SCIS must be filed with the Commission as part of the cost support data submitted by BOCs filing tariffs that implement ONA plans.[3] Prior to the FOIA request, the Bureau also had determined that the materials were entitled to confidential treatment under Exemption (b)(4) of the FOIA.[4] Further, when the ONA tariffs were set for investigation, the Bureau established special procedures whereby intervenors in the ONA tariff investigation have been granted access to a limited amount of SCIS material subject to nondisclosure agreements and whereby all SCIS models and related documentation is to be reviewed by an independent auditor under a separate nondisclosure agreement.[5]

3. In responding to the January 6, 1992 FOIA request, the Bureau reaffirmed its earlier determination that the requested records are not required to be disclosed under FOIA. Specifically, the Bureau's decision relied heavily upon its conclusion that the SCIS model and associated data constitute confidential materials exempt from disclosure under Exemption (b)(4) of the FOIA because the model and documentation contain competitively sensitive materials and because disclosure of these materials could compromise agency programs. On appeal, Allnet argues that the Bureau has failed to carry the burden of proof established by case precedent to justify withholding the requested documents pursuant to this FOIA exemption.

DISCUSSION

4. As fully discussed in the Bureau's underlying decisions, Exemption 4 of the FOIA protects from compulsory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4). To justify withholding commercial or financial information pursuant to Exemption 4, an agency has the burden of showing that disclosure of the information is likely . . . either . . . (1) to impair the government's ability to obtain necessary information in the future; (2) cause substantial harm to the competitive position of the person from whom the information is obtained; or (3) result in harm to the effectiveness of agency programs. *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *Critical Mass Energy Project v. NRC*, 830 F.2d 278 (D.C. Cir. 1987). We conclude that the documents at issue are protected from mandatory disclosure under this test.[6] The materials at issue are discussed separately below.[7]

5. *SCIS Model.* The SCIS model is computer software. In essence, the model constitutes a sophisticated computer assembly of interwoven mathematical expressions (algorithms) that replicate a complex electronic switching system. Bellcore and U.S. West state that their models are copyrighted but not published or patented so that access remains confidential. Bellcore licenses its model to BOCs, independent LECs and other entities. The Bureau determined that the SCIS model is exempt from public disclosure. It concluded that the model is valuable intellectual property whose disclosure would enable avoidance of substantial licensing fees. In addition, it stated that the algorithms, which constitute the heart of the model, are mathematical expressions of the technical and cost characteristics of specific switch technologies, which if reverse engineered could disclose the details of the technologies they replicate, thereby causing competitive harm to the switch manufacturers.

6. Allnet claims that, because these materials are copyrighted, they necessarily fall outside the ambit of Exemption 4 because the copyright laws provide sufficient protection against competitive harm. Allnet also disputes that the algorithms are trade secrets or that they can be reverse engineered to reveal confidential vendor data.

7. We conclude that public disclosure of the SCIS model would result in substantial competitive harm to the carriers. As the Bureau noted, public disclosure of these confidential materials would substantially reduce their value to Bellcore and U.S. West, as it would enable avoidance of licensing fees to which the carriers otherwise are entitled under copyright laws. Futhermore, a software competitor could use the materials to develop a similar, competing product. Moreover, there is no support for Allnet's position that copyrighted materials may not enjoy the protection afforded by Exemption 4.[8] In light of these determinations, we need not reach, and do not address herein, the Bureau's further conclusion that the algorithms can be used to reverse engineer, and thereby discover, confidential vendor information.[9]

8. *Vendor Switch Input Data.* Vendor switch input information consists of detailed cost and technical information regarding the vendor's switches, which is supplied by the switch vendors to Bellcore for input into the SCIS model.[10] The information is provided to Bellcore and U.S. West for use in their SCIS models pursuant to confidentiality agreements with the vendors, which prohibit public disclosure as well as disclosure to other network planners at Bellcore.

9. The Bureau concluded that public disclosure of this information would pose a substantial risk of competitive harm to the switch vendors. The Bureau further concluded that disclosure could jeopardize the implementation of ONA if switch vendors were to refuse to provide their data to Bellcore, and the BOCs consequently were unable to produce the requisite tariff support materials. The Bureau thus concluded these materials were exempt under the competitive harm and program effectiveness prongs of Exemption 4.

10. Allnet claims the Bureau did not adequately support its conclusion that disclosure of the switch vendors' costs and technical information would result in substantial competitive harm to the vendors. As to the cost data, Allnet states that the only information at issue here are prices that have been paid for switches by the BOCs, and Allnet believes that, in a competitive market, such pricing information must already be known to competitors. It further states that, in a competitive market, disclosure could not cause each competitor to modify its pricing structure to secure a competitive advantage because prices are already at, or close, to costs. If, on the other hand, the switch manufacturing business is an oligopoly business, Allnet suggests this would result in lower prices for telecomunications services and would therefore cause no "harm."[11]

11. Switch manufacturers who participate in this proceeding vigorously dispute Allnet's claim that disclosure of cost information would not result in substantial competitive harm to their businesses. Northern Telecom states that it would be significantly injured by public disclosure of sensitive cost information because such disclosure would allow its competitors to obtain critical information about Northern Telecom's pricing strategies and practices. It notes that, in the highly competitive switch market where most purchases are accomplished through sealed bids, such information in the hands of Northern Telecom's competitors could result in Northern Telecom losing significant business.

12. Another switch manufacturer, AT&T, echoes these concerns and further observes that access to this cost information would permit a competitor to determine the costs of each of the company's central office switching systems, and the competitor could modify its pricing structure accordingly. Finally, Bellcore observes that prices charged one customer may differ from those charged another customer by the same switch manufacturer and customer discounts will fluctuate between vendors and customers. Thus, vendors do not want customers to know what discounts or charges have been made to other customers.[12]

13. We have no reason to dispute the switch manufacturers' assertions that the pricing and cost information in question is, in fact, held in confidence by them and that, because of the nature of the switch market, its disclosure would result in substantial competitive harm to vendors.[13] We thus concur in the Bureau's conclusion that the highly competitive nature of the switching equipment market magnifies the significance of pricing strategies and that, in this environment, knowledge of a competitor's pricing (even its past pricing strategies) assists a manufacturer in underbidding its competitors. Further, it appears that access to the information may allow vendors to determine a competitor's costs at the level of switch components and would have an impact on a competitor's pricing strategies. Finally, it appears that BOC access to information regarding the prices switch vendors have negotiated with other BOCs in the past would also harm the vendors by driving down any future negotiated prices.[14] We thus affirm the Bureau's conclusion that disclosure of this information will likely cause substantial competitive harm to the switch vendors and, hence, that it is protected from public disclosure under Exemption 4.

14. Finally, Allnet also challenges the Bureau's determination that, because switch vendors may refuse to supply this information to the BOCs if it is publicly disclosed, release of the switch vendor input records would result in harm to the effectiveness of the Commission's ONA program, under the third prong of Exemption 4.[15] Allnet responds that because the BOCs purchase these switches they necessarily will know the cost and technical information necessary for input into the SCIS model and therefore need not rely on additional information supplied by switch vendors.

15. At the outset, Allnet's argument rests on a mischaracterization of the type of vendor information at issue. As Allnet observes, switch vendors can not, of course, withhold prices from their customers. The SCIS model, however, requires highly detailed and timely cost data in order to generate investment cost data used in support of tariff filings. Bellcore thus must acquire sensitive and disaggregated pricing and engineering information directly from the switch vendors. This type of vendor cost information is not routinely given to customers and is supplied to Bellcore only pursuant to strict confidentiality agreements, which provide that the information cannot be disclosed to other network planners at Bellcore or to other vendors in order to guard against the possible competitive harms discussed above.

16. Similarly, Allnet maintains that vendors cannot withhold technical information about a switch from a BOC and therefore release of this information will not affect the BOCs' ability to obtain such information in the future. Allnet's analysis again is flawed. While it is true that the BOCs would need to know basic technical and performance information before purchasing a switch, they would not ordinarily be supplied with full design and engineering specifications for each switch component, as well as similarly specific assembly and software data, simply in order to make purchasing decisions.

17. Furthermore, one switch vendor, Northern Telecom, has already stated in this proceeding that it might well not be able to provide the information or allow its use in the SCIS model if the information it now supplies is made publicly available. Thus, if compelled to disclose this information publicly, it appears that switch vendors may well be unwilling to continue to supply detailed technical and financial information necessary to run the SCIS. While the Commission has the authority to require the submission of a wide range of information from the carriers to support tariff filings, it has no authority to compel the switch vendors to supply the information to Bellcore. Without the switch data, SCIS would be rendered mean-

ingless and the Commission, in turn, would be deprived of an important tool needed to evaluate the ONA tariffs. Accordingly, we are not persuaded by Allnet's arguments, and we affirm the Bureau's decision regarding the program effectiveness prong of Exemption 4.

18. *Output Data.* SCIS generates several types of technology-specific intermediate outputs. For example, one set of outputs represents investment for a particular switching technology's costs broken down to the most disaggregated parts and aspects of the technology. These disaggregated costs are based on generic machine characteristics, such as central processing unit time needed to perform internal switch functions. Another set of outputs represents a combination of these basic costs and specific switch features and functions. The Bureau determined that disclosure of these intermediate SCIS technical output reports would pose a significant risk of substantial competitive injury to switch vendors. In the instant proceeding Allnet does not set forth a specific basis for challenging the Bureau's decision with regard to the competitive sensitivity of this output data, but in its related Application for Review of the *SCIS In Camera* order it argues that technical and price inputs cannot be discovered by having access to the technical output reports.

19. We affirm the Bureau's decision that the output reports are entitled to confidential treatment. Disclosure of these outputs would give competitors of switch manufacturers a means to obtain valuable pricing and switch engineering data. For example, by examining an output report a competitor can compare the investment costs of disaggregated components associated with providing specific BSEs. In addition, a vendor could determine which components of the switch are utilized to provide a given BSE. Information such as this would enable a vendor's competitors to design and market the next generation of switches by exploiting apparent vulnerabilities or inefficiencies in the switch. Accordingly, we conclude that this information is confidential because its disclosure would likely result in substantial competitive harm to the switch vendors.

CONCLUSION

20. In view of the foregoing, the Application for Review filed by Allnet Communications Systems, Inc. IS DENIED to the extent indicated herein.[16] Allnet may seek judicial review of this decision pursuant to 5 U.S.C. §552(a)(4)(B).

21. The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett, and Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Oppositions were filed by American Telephone and Telegraph Company, US West Communications, Inc., Bell Communications Research (Bellcore) and Northern Telecom, Inc. A reply to these oppositions was filed by Allnet.

[2] US West does not rely on SCIS, but instead uses its own equivalent model, the Service Cost Model. Ameritech, in addition to SCIS, relies on another model, the Common Channel Switching Cost Information System. Hereafter, we use the term SCIS to refer to all computer models used by the BOCs to develop BSE costs for ONA implementation.

[3] *See Commission Requirements for Cost Support Material to be Filed With Open Network Architecture Access Tariff*, 6 FCC Rcd 5682 (Com. Car. Bur. 1991).

[4] *See Commission Requirements for Cost Support Materials to be Filed With Open Network Architecture Access Tariffs*, 7 FCC Rcd 521 (Com. Car. Bur. 1991).

[5] *See Commission Requirements for Cost Support Materials to Be Filed With Open Network Architecture Access Tariff*, 7 FCC Rcd 1522 (Com.Car.Bur. 1992). The SCIS-related Bureau determinations are currently subject to separate applications for review.

[6] We note that the court's second decision in *Critical Mass Energy Project v. NRC*, 931 F.2d 939 (D.C. Cir. 1991), relied upon by Allnet, was subsequently vacated and an *en banc* hearing ordered so that the full D.C. Circuit can consider whether the "objective" definition of confidentiality set forth in *National Parks* is, in fact, faithful to the language and legislative history of exemption 4. *See Critical Mass v. Energy Project*, No. 90-S120 (D.C. Cir. Sept. 6, 1991).

[7] Having determined that the materials in question are exempt from public disclosure under FOIA Exemption 4, our ruling herein does not in any way address issues concerning the propriety of the Bureau's procedures established for more limited disclosure of the information in the tariff investigation. Those matters properly are addressed in the context of that proceeding, as they concern discretionary disclosure of the materials, issues which are not governed by FOIA requirements. *See Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). We thus do not address here Allnet's separate claim that the materials, even if exempt from public disclosure under the FOIA, should nevertheless be released to Allnet pursuant to a protective order. Those issues will be addressed in a subsequent order.

[8] *See Warrington Associates, Inc. v. Real-Time Engineering Systems, Inc.*, 522 F. Supp 367, 368 (N.D. Ill. 1981) (the fact that an expression is copyrighted does not, in and of itself, disclose the trade secret or eliminate the mantle of confidentiality); *see also Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981) (when a copyrighted work can be acquired elsewhere, at some cost, it is not rendered "nonconfidential" under Exemption 4).

[9] Nor is it necessary to address at this juncture the carriers' claims that the materials are "trade secrets" within the meaning of Exemption 4. *But cf. Com-Share, Inc. v. Computer Complex, Inc.*, 338 F. Supp 1229, 1238 (D.C. Mich. 1971) (determination that computer software constitutes trade secrets).

[10] Technical information provided by the switch vendors includes long range product development plans and delivery schedules, detailed technical descriptions of switch architecture, hardware engineering rules and capacities, unit level prices of individual switching components, discount schedules, service descriptions and resource consumptions on a per feature basis.

[11] At various points in its Application for Review, Allnet also suggests that, even if competitive harm might result from disclosure of the requested materials, the asserted harm would not

occur if the materials were disclosed under a protective order. We note, however, that the determination of likely substantial competitive harm for purposes of applying Exemption 4, rests on an assumption that material will be disclosed publicly. As indicated above, issues related to the propriety of limited disclosure under a protective order are not governed by the FOIA and are not addressed herein. *See* note 7, *supra*.

[12] We note that even "list prices" are held in confidence by the switch manufacturers.

[13] Northern Telecom and AT&T also state that they would suffer substantial competitive harm if information regarding the operational characteristics of their switches were disclosed to their competitors. Allnet does not set forth any specific basis for challenging the Bureau's determination to withhold the switch vendors' technical input data. Accordingly, Allnet has not suggested any basis for disturbing the Bureau's determination that disclosure of the technical information itself to a switch vendor's competitors would likely result in substantial competitive harm to the switch vendor. We also note that this technical design information may warrant independent protection as an Exemption 4 trade secret.

[14] Although, in Allnet's view, this result would be beneficial to telecommunications customers, such considerations simply are not relevant to a determination whether the information is within Exemption 4, which hinges on whether disclosure would likely cause substantial competitive harm to the switch vendors.

[15] Allnet mistakenly suggests that the Bureau's decision in this regard was based on the "impairment" prong of Exemption 4.

[16] *See* note 7, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company

Revisions to Tariff F.C.C. No. 73 — Transmittal No. 2205

MEMORANDUM OPINION AND ORDER

Adopted: September 11, 1992; Released: September 11, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On June 16, 1992, Southwestern Bell Telephone Company (Southwestern) filed Transmittal No. 2205 to restructure rates for its MegaLink Custom Service. On July 1, 1992, Metropolitan Fiber Systems, Inc. (MFS) filed a petition to reject, or alternatively, suspend and investigate Transmittal 2205 because the proposed tariff revisions would result in unreasonably discriminatory and unjustified rates. MFS Petition at 2. Southwestern filed a reply to the MFS petition on July 13, 1992, claiming that MFS misinterprets Transmittal 2205 and misreads current tariffs. Transmittal 2205 is scheduled to become effective on September 14, 1992. For reasons discussed more fully below, we reject Transmittal 2205 because it is unreasonably discriminatory in violation of Section 202(a) of the Communication's Act, 47 U.S.C. § 202(a).

II. BACKGROUND

2. Southwestern's current tariff contains two rate structures for MegaLink Custom Service, its DS3 service. Vintage service rates and rate structure apply to those customers who established a term plan for service prior to May 25, 1991. Southwestern Bell Telephone Company, Tariff F.C.C. No. 73 at Section 20.6. The current MegaLink Custom rate structure and term rates apply to customers who established service after May 25, 1991 or whose vintage service term plans have expired. *Id.* at Section 20.5. Vintage service rates are priced on a flat-rate basis, depending on the number of DS3 circuits ordered, the length of haul, and the term plan selected. These rates also depend on the category of service.[1] *Id.* at Section 20.6. The current MegaLink Custom rate elements include channel termination charges that apply to each end of the circuit, and channel mileage charges that apply to the interoffice link. The channel termination rate element varies by the volume option and term plan selected by the customer. *Id.* at Section 20.5.

3. Transmittal 2205 would add language to Southwestern's tariff to allow a DS3 customer subscribing to a long term commitment plan to continue receiving its reduced rate, on a month-to-month basis, at the conclusion of its contractual period. There is no time restriction on how long the customer would be allowed to continue to receive service at the reduced rate. Southwestern indicates it is making the proposed change in order "to be more responsive and flexible to marketplace demands...." Description and Justification at 1.

III. PLEADINGS

A. Petition

4. MFS asserts that Southwestern provides DS3 service through a complicated rate structure because Southwestern offers vintage service rates and MegaLink service rates for the same DS3 service. *Id.* at 2. MFS claims that vintage service rates were an attempt by Southwestern to fit its DS3 individual case basis (ICB) contracts into an averaged tariff structure. *Id.* at 4. According to MFS, the vintage service has different rate elements and lower prices than non-vintage MegaLink service. *Id.* at 2-3.

5. MFS contends that, by allowing a vintage service term customer to continue month-to-month at vintage term rates, Transmittal 2205 grandfathers vintage service indefinitely. *Id.* at 5. MFS claims that Transmittal 2205 would establish a favored class of vintage service customers which is unreasonably discriminatory in violation of Section 202 of the Communications Act and would also violate the spirit of the Commission's *ICB Final Order*, in which the Commission specifically rejected the grandfathering of ICB rates. *Id.* at 6 (*citing Local Exchange Carriers' Individual Case Basis DS3 Service Offerings*, CC Docket No. 88-136, 4 FCC Rcd 8634, 8642 (1989)).

6. Finally, MFS claims that for Southwestern to extend indefinitely any term discount is unjustified. MFS asserts that the usual justification for term discounts is that they reduce certain local exchange carrier (LEC) costs because the carrier has a guarantee of future revenues. Transmittal 2205, argues MFS, involves discounted rates for customers taking service on a month-to-month basis and thus eliminates any cost justification of guaranteed revenues. *Id.* at 7. According to MFS, Southwestern offers only the inadequate justification that these customers at one time were obligated to take service pursuant to long term service contracts. *Id.* at 7-8.

B. Reply

7. Southwestern asserts that Transmittal 2205 does not grandfather vintage service rates indefinitely. Rather, argues Southwestern, this proposed change applies to the manner in which MegaLink Custom services can be extended after the expiration of the term agreement.[2] South-

[1] There are three categories of service: electrical DS3s routed from one customer premises to another; electrical DS3s routed from a customer premises to a Southwestern hub office; and optical DS3s and dark fiber.

[2] Furthermore, Southwestern disputes the claim that vintage rates are far below non-vintage rates. Southwestern contends that vintage rates were restructured under the price cap rules to yield non-vintage rates, and, these restructured rates were equivalent overall to vintage rates. Southwestern Reply at 2-3.

western Reply at 3. Southwestern contends that any MFS reference to grandfathering of ICB rates is inapplicable because Transmittal 2205 does not grandfather rates. Southwestern states that Transmittal 2205 merely allows customers who have taken service pursuant to a term plan to continue to pay those term rates after the expiration of the term period. *Id.* at 4.

8. Southwestern further asserts that the Commission should reject the MFS arguments that Transmittal 2205 is not cost justified or that extending the billing period rates of those customers who have met their minimum billing period obligations is unreasonable. Southwestern then contends that its filing complies with Part 61.49 of the Commission's rules and the rules do not require the cost justification MFS requests. *Id.* at 4. Southwestern finally contends that customers who have completed their billing period obligations perceive themselves as differently situated from those customers who have had no billing period obligation and they expect to be treated accordingly. Southwestern argues this customer perception is reasonable. *Id.* at 5.

IV. DISCUSSION

9. To determine whether a service is unreasonably discriminatory under Section 202(a) of the Communications Act, the Commission applies a three part test. We first examine whether the service is like any other service. If the service is like another, we look for whether customers are charged different rates for these like services, which evidences discrimination. Finally, if there is discrimination, we ask whether there is any reasonable justification for it.[3] Transmittal 2205 allows a term plan customer to continue service indefinitely, on a month-to-month basis, at the customer's previous term plan rate. Thus, the extended term plan rates are available to customers who are no longer taking service under a term plan. Those customers whose term plans have expired will pay different rates for the identical service received by non-term customers or customers who are in a different term plan. This constitutes discrimination.

10. The only question, then, is whether Southwestern provided reasonable justification for this discriminatory rate structure.[4] We conclude that it did not. Term plan rates are typically lower because they reflect risk allocation between carrier and customer. Both parties are prepared to accept guaranteed rates in return for rate stability. Once the term plan expires, however, the carrier no longer has a guarantee of rate stability. Therefore, Southwestern must explain why it is reasonable for a customer to continue to receive lower rates. Southwestern's only justification for the rate discrimination is a conclusory and unsupported statement that customers completing term plans perceive themselves as differently situated from customers who never had a term plan, and therefore expect to be treated accordingly. That a customer expects to pay a certain, in this case lower, rate has never been grounds to show a discrimination is reasonable. Presumably, the customer who pays the discriminatory, in this case higher, rate would also expect to pay the lower rate if given the opportunity to do so. The Commission has considered customer perception only in determining whether services are like.[5]

11. The Bureau finds, for the above reasons, that Transmittal 2205 is unreasonably discriminatory, in violation of Section 202(a) of the Act. It is therefore patently unlawful and is rejected.

V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that, pursuant to Section 202(a) of the Communications Act of 1934, 47 U.S.C. § 202(a), the tariff revisions filed by Southwestern Bell Telephone Company in Tariff F.C.C. No. 73, Transmittal No. 2205, ARE REJECTED.

13. IT IS FURTHER ORDERED that Southwestern Bell Telephone Company SHALL FILE tariff revisions removing the rejected material and reinstating currently effective material no later than five business days from the release of this Order to be effective on one day's notice. Special Permission No. 92-631 is assigned for this purpose and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58 and 61.59, are waived. IT IS FURTHER ORDERED that the petition to reject or suspend and investigate Southwestern Bell Transmittal 2205 filed by Metropolitan Fiber Systems, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[3] *See* AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568, Memorandum Opinion and Order on Remand, 6 FCC Rcd 7039, 7041 (para. 8) (1991) (*Tariff 12 Remand Order*).

[4] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6825-26 (1990) (*LEC Price Cap Order*) (holding that "our review of restructured services will focus on the possibility of unreasonable discrimination"); *see also* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No 87-313, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 665, 674 (para. 81) (1991) (*AT&T Price Cap Reconsideration Order*) (finding that restructured services may raise discrimination issues notwithstanding compliance with caps and bands).

[5] *See* Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790, 794 (D.C. Cir. 1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 16, 1992

SOUTHWESTERN BELL REQUESTS WAIVER TO PERMIT INTEREXCHANGE CARRIERS TO REQUEST THAT SOUTHWESTERN BELL TERMINATE THEIR FGB TRAFFIC OVER FGD TRUNK GROUPS WHILE CHARGING PREMIUM RATES

Pleading Cycle Established

COMMENTS: October 5, 1992
REPLY COMMENTS: October 19, 1992

On September 4, 1992, Southwestern Bell requested a waiver of Section 69.105(b)(1)(i) of the Commission's Rules, 47 C.F.R. § 69.105(b)(1)(i). That section provides that an access customer "is deemed to receive premium access if access is provided through a local exchange switch that has the capability to provide access for an MTS-WATS equivalent service that is substantially equivalent to the access provided for MTS and WATS..." Southwestern Bell notes that currently all Feature Group B (FGB) traffic terminating in end offices not converted to equal access is billed at non-premium rates. Southwestern Bell states that at least one IXC has expressed a desire to route terminating FGB traffic from the IXC's point of presence to nonconverted end offices over Feature Group D (FGD) tandem trunk groups. SWB is concerned that Part 69 of the Commission's rules may preclude billing this traffic at premium rates.

Southwestern Bell asserts that the quality of service for the FGB traffic that would travel over the FGD trunks for a portion of its routing will be almost identical to the service given to FGD traffic that terminates in a converted end office. Nevertheless, says Southwestern Bell, termination in a nonconverted end office has traditionally been billed at non-premium rates pursuant to Part 69. It therefore requests a waiver of those rules to permit, at the IXC's option, routing of terminating FGB traffic from the IXC's point of presence over the FGD tandem trunk group, but Southwestern would bill that traffic at premium rates.

Interested parties may file comments regarding this petition no later than October 5, 1992. Reply comments may be filed no later than October 19, 1992.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with Downtown Copy Center, the Commission's duplicating contractor, at its office in Suite 640, 1990 M Street, N.W., Washington, D.C. 20554, and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W. Washington, D.C. 20554.

For further information, contact Wanda Harris or Debra Sabourin, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 73 — Transmittal No. 2211

ORDER

Adopted: September 15, 1992; Released: September 15, 1992

By the Deputy Chief, Common Carrier Bureau:

1. On July 17, 1992, Southwestern Bell Telephone Company (Southwestern) filed Transmittal No. 2211 to introduce a new service which will be marketed by Southwestern as "DovLink." The new offering will allow the end user to send data over an existing local exchange loop simultaneouly with its voice traffic. This derived channel for DovLink can be connected to a 2.4, 4.8 or 9.6 kbps transport facility while the two-wire local exchange line continues to operate and provide normal access to Southwestern's public switched network. *See* Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Tr. 2211, Description and Justification at 1. The tariff is scheduled to take effect on September 16, 1992.

2. Metropolitan Fiber Systems, Inc. (MFS) filed a petition to reject or suspend and investigate Transmittal 2211 on August 3, 1992. Southwestern filed a reply on August 13, 1992.

3. MFS argues that DovLink is unreasonably discriminatory because the channel termination rate element is priced at approximately 50 percent of that same rate element for currently tariffed Megalink services even though the services are identical. MFS Petition at 1-4. MFS also asserts that the recurring and nonrecurring rates proposed for DovLink channel terminations are strategically set well below long run incremental cost, and as such, are unreasonable. *Id.* at 4-5. MFS then charges that Southwestern is subsidizing its DovLink service -- which is becoming subject to competition -- with revenues from its switched services -- which are provided exclusively on a monopoly basis. *Id.* at 6. Finally, argues MFS, Southwestern's filing fails to provide for additional allocations of company overhead costs, directly contravening the Commission's price cap rules. *Id.* at 6-7.

4. Southwestern replies that DovLink and Megalink are not like services. Southwestern Reply at 2. Southwestern argues that the services are targeted for different customers, are provided under technical parameters described in two different technical publications, and are offered at different speeds. *Id.* at 2-3. Southwestern also notes that, unlike DovLink, MegaLink includes a service guarantee of 99.8 percent error free performance. *Id.* at 3. In response to MFS's claims that DovLink is priced well below long run incremental cost, Southwestern maintains that MFS ignores how DovLink service is provisioned. *Id.* at 4. Southwestern insists that since DovLink service is provided over an existing local exchange access line there is no need to add this cost to the price of DovLink service. *Id.* Finally, Southwestern disputes MFS's claim that no overhead cost allocations are included in DovLink prices. *Id.*

5. The Common Carrier Bureau has reviewed Southwestern Bell Transmittal No. 2211, and all associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

6. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Transmittal No. 2211, filed by Metropolitan Fiber Systems, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief (Policy),
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Policies and Rules Pertaining to the Equal Access Obligations of Cellular Carriers — RM-8012

Motion for Extension of Time

ORDER

Adopted: September 16, 1992; Released: September 17, 1992

By the Chief, Common Carrier Bureau:

REPLY COMMENTS: October 15, 1992

1. On June 2, 1992, a petition for rulemaking was filed by MCI Telecommunications Corporation (MCI) seeking a Commission requirement that all cellular licensees interconnect with interexchange carriers via uniform, nationwide, cellular equal access policies and procedures. The Commission on June 10, 1992, released a Public Notice (DA 92-745) directing that comments on MCI's petition should be filed by August 3, 1992 and reply comments should be filed by September 1, 1992.

2. On July 15, 1992, we granted a motion for an extension of time to file comments submitted by McCaw Cellular Communications, Inc. (McCaw). In that decision, we provided that all interested parties must file comments in the above-captioned proceeding by September 2, 1992. The date for filing of replies was also extended until October 1, 1992.

3. On September 10, 1992, MCI filed a motion for an extension of time to file reply comments in this docket. MCI seeks an additional 14 days, until October 15, 1992, to file replies. MCI states that it is in the public interest to grant its motion because of the number and complexity of the initial comments filed and the issues raised therein, and that a number of ongoing proceedings may prevent some parties, particularly smaller cellular companies with limited resources, from participating fully in the reply round of this docket.

4. The Common Carrier has reviewed MCI's motion for extension of time and has determined that good cause has been shown to grant all interested parties until October 15, 1992, to file reply comments in the above-captioned proceeding.

5. Accordingly, IT IS ORDERED that MCI's motion for extension of time IS GRANTED and all interested parties have until October 15, 1992, to file reply comments in the above-captioned proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE CO., INC. File No. I-T-C-92-183

Application for authority to acquire and operate facilities for direct international message telecommunications service between Hawaii and Russia.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 18, 1992; Released: October 1, 1992

By the Chief, International Facilities Division:

1. The above-captioned application, filed on June 2, 1992 by GTE Hawaiian Telephone Co., Inc. (HTC) and amended on July 22, 1992, requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate INTELSAT Pacific Ocean Region (POR) satellite facilities for direct service between Hawaii and Russia. The application was placed on public notice on June 10, 1992. Comments and Reply comments on the Amendment were filed by Management Communications Services (MCS).

2. MCS's comments, which were not filed in opposition to HTC's application, addresses three main concerns: (1) how HTC intends to process interstate traffic; (2) whether the foreign carrier is an authorized correspondent carrier; and (3) the possibility for whipsawing. HTC's amendment to its application states that it will only switch transit traffic received from Russia outbound to points other than the U.S. mainland. HTC further asserts that its Russian correspondent, Daltelecom, has represented that it is an authorized carrier in Russia, and that the HTC and Daltelecom have agreed to an accounting rate which is the same as that used by AT&T with the former Soviet Union. Based on this information, we believe that HTC's amendment sufficiently clarifies any ambiguities in the application which were raised in MCS's comments.

3. Upon review of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between Hawaii and Russia.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-92-183 IS GRANTED, and HTC is authorized to:

a. lease from Comsat and operate one 2.048 Mbps satellite circuit between an appropriately authorized earth station in Hawaii and appropriate INTELSAT POR satellites, connecting with a similar circuit between a POR satellite and an earth station in Russia, furnished by HTC's correspondent in Russia, Daltelecom; and

b. use said facilities to provide HTC's authorized international message telecommunications services between Hawaii and Russia.

5. IT IS FURTHER ORDERED that the applicant shall file separate Section 214 applications to establish any additional circuits between Hawaii and Russia.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

9. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between HTC and its correspondent in Russia and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 21, 1992

Released: September 23, 1992

Allen Burton
Route 1
Hornbeak, TN 38232

Re: NAL/Acct. No. 215HF0017

Dear Mr. Burton,

1. By this Notice of Apparent Liability, we initiate enforcement action against Allen Burton, licensee of station KA4URC in the amateur radio service, for apparent violation of Section 97.113(d) of the Commission's rules, 47 C.F.R. Section 97.113(d). Section 97.113(d) prohibits the transmission of obscene and indecent words, language or meaning. For the reasons discussed below, Burton is apparently liable for a forfeiture in the amount of $2,000 for the violation.

2. On June 29, 1992, between 3:53 and 4:22 PM CST, the Commission's Kingsville Office monitored a conversation on frequency 14300 kHz which included transmissions by an individual identifying the station with the call sign KA4URC. Commission records indicate that amateur radio station KA4URC is licensed to Mr. Allen Burton, Route 1, Hornbeak, Tennessee, 38232.[1] We find that the words and language transmitted are indecent within the meaning of Section 97.113(d) and prevailing Supreme Court and Commission precedent.[2]

3. Speech is considered indecent if it describes sexual or excretory activities and organs in patently offensive terms.[3] It need not depict or describe "hard core" sexual conduct as required for a finding of obscenity.[4] We find that the transmissions describe sexual acts and organs in a patently offensive manner and go well beyond what an average adult person in any community would consider to be worthy of protection.

4. One of the Commission's goals is to protect children from exposure to sexually explicit communications over the airwaves. The Commission has previously stated that "the concept of indecency is intimately connected with the exposure of children to material that most parents regard as inappropriate for them to hear."[5] Amateur transmissions are accessible to homes over a large area and a significant number of licensed amateurs are children in their formative years.[6] Additionally, the transmissions were made in the summertime in the afternoon when there is a real likelihood that children are listening.[7] The use of indecent language by amateur radio licensees is proscribed by the Commission, and *Pacifica* is the proper standard to apply to a finding of indecency in the amateur radio services.[8]

5. Based on the foregoing, it appears that Burton has willfully violated Section 97.113(d) and that imposition of forfeiture penalties is warranted.[9] The Commission's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act of 1934, 47 U.S.C. Section 503(b).

6. Under our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, FCC 92-212, 57 Fed. Reg. 24,986 (June 12, 1992), the base amount for a violation related to transmission of indecent material is $5,000 for each offense. Because Mr. Burton is an individual and this is a first offense we are adjusting the amount downward to $2,000. No further adjustment appears warranted.

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[1] The individual also identified himself as "Al from Tennessee". Further, Burton's voice was recognized by the technician who monitored the transmission as that of Allen Burton, KA4URC. Tapes and transcripts of Burton's transmissions as recorded by the Kingsville Office are on file at the Commission in the Field Operations Bureau's headquarters in Washington, D.C.

[2] *See* Pacifica, 438 U.S. at 726(1977). *See also*, Action for Children's Television v. FCC, 852 F.2d 1332, 1334 (D.C. Cir. 1988)(upholding FCC's generic definition of indecency); Evergreen Media Corp. of Chicago AM, 6 FCC Rcd 502 (1991); Guy Gannett Publishing Co., 5 FCC Rcd 7688 (1990); Pacifica Foundation, Inc., 2 FCC Rcd 2705(1987); Regents of the University of California, 2 FCC Rcd 2703 (1987); *order on reconsideration*, Infinity Broadcasting Corp., 3 FCC Rcd 930 (1987).

[3] *See* Pacifica, 438 U.S. at 732.

[4] The Supreme Court in Miller v California, 413 U.S.15 (1973), found that a work is obscene if:

> (a) an average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest: (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable law, and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24. Indecent speech is a broader, less restricted category of speech. *See* Pacifica, 438 U.S. at 732; Pacifica Foundation, 56 FCC 2d 94, 98 (1975). *See also* Information Providers Coalition for the Defense of the First Amendment v. FCC, 928 F2d 866 (9th Cir. 1991); Dial Information Services v. Thornburgh, 938 F2d 1535, 1540-41 (2d Cir. 1991).

[5] Infinity Broadcasting of Pennsylvania, et al., 3 FCC Rcd 930, 931-32 (1987).

[6] *See* David Hildebrand, 2 FCC Rcd 2708 (1987).

[7] This fact is corroborated by a survey of minor amateur radio licensees taken in April 1992 by The American Radio Relay League, Inc. (ARRL). ARRL surveyed 1,000 of the approximately 16,000 amateur licensees under the age of eighteen. 214 licensees responded. The most popular times of day when those respondents operated were between 3 pm to 10 pm. The frequency band on which Burton transmitted, the 20 meter band, was a popular band among the respondents. While not a statistically valid sample, the survey does show that there is a real likelihood that children were operating or listening when Burton transmitted.

[8] *See* Hildebrand, 2 FCC Rcd at 2709-10.

[9] Willful is defined as "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act... ." 47 U.S.C. Section 312 (f)(1).

7. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), and Section 97.113(d) of the Commission's rules, 47 C.F.R. Section 97.113(d), that Allen Burton is apparently liable for a monetary forfeiture in the amount of $2,000 for willful violation of Section 97.113(d) of the Commission's rules, 47 C.F.R. Section 97.113(d), in the manner described above. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

8. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Allen Burton shall, within 30 days of the release date of this notice, pay the full amount of the proposed forfeiture or file a response showing why the proposed forfeiture should be reduced or not imposed.[10] Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. The remittance should be marked "NAL/Acct. No. 215HF0017" and mailed to:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Attn: NAL/Acct. No. 215HF0017
Stop Code 1500E
1919 M Street, N.W.
Washington, D.C. 20554

9. IT IS FURTHER ORDERED that this notice shall be sent by certified mail, return receipt requested, to Allen Burton, Route 1, Hornbeak, TN, 38232.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

[10] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SATELLITE TRANSPONDER LEASING CORPORATION — File Nos. 40/41/42-DSS-AL-92

Application for *pro forma* assignment of licenses for SBS-4, SBS-5 and SBS-6

ORDER AND AUTHORIZATION

Adopted: September 21, 1992; Released: October 1, 1992

By the Chief, Domestic Facilities Division:

1. Satellite Transponder Leasing Corporation and Hughes Communications Galaxy, Inc. (STLC/Hughes) have filed an application for the *pro forma* assignment of the authorizations to construct, launch and operate its SBS-4, SBS-5 and SBS-6 domestic fixed-satellites[1] from STLC to Hughes Communciations Galaxy, Inc. For the reasons discussed below, the applications are granted.

2. STLC is a wholly-owned subsidiary of Hughes and licensee of the SBS-4, SBS-5 and SBS-6 domestic fixed-satellites. With this assignment, Hughes wants to merge STLC "upstream"[2] into Hughes. STLC/Hughes state that Hughes holds 100% of the stock of STLC and is a qualified FCC licensee as a matter of record. In addition, STLC/Hughes assert that this assignment can have no detrimental consequences to a third party.

3. We find that grant of this application is in the public interest. Hughes's qualifications to construct, launch and operate a domestic fixed-satellites system are a matter of record before the Commission. Hughes holds 100% of the stock of STLC and ultimate control of these satellites will remain with Hughes. Therefore, Commission approval may be granted on a *pro forma* basis and does not require a thirty-day notice period as specified in Sections 309(b) and (d)(1) of the Communications Act, 47 U.S.C. §§ 309(b) and (d)(1).

4. Accordingly, IT IS ORDERED that, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, Satellite Transponder Leasing Corporation and Hughes Communciation Galaxy, Inc.'s application for consent to assignment of the authorizations for the SBS-4, SBS-5 and SBS-6 domestic fixed-satellites IS GRANTED. All existing terms and conditions applicable to these authorizations shall remain in full force and effect.

IT IS FURTHER ORDERED that this order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] *See* Satellite Business Systems, FCC 81-464 (released October 5, 1981) (construction of SBS-4); Satellite Business Systems, 94 FCC 2d 447 (1983) (launch SBS-4 and construct, launch and operate SBS-5); Satellite Business Systems, 103 FCC 2d 856 (1985) (construct, launch and operate SBS-6); Satellite Business Systems, Public Notice Report No. DS-463 (released November 6, 1985) (*pro forma* assignment of SBS-4, -5 and -6 from Satellite Business Systems to STLC); and International Business Machines Corporation, et al., 5 FCC Rcd 1655 (1990) (transfer of control of STLC from IBM to Hughes).

[2] By this action, all of STLC's assets and liabilities would be transferred to Hughes, thus, merging STLC into its parent company, Hughes.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-266

In the Matter of

TELEPHONE COMPANY-
CABLE TELEVISION
Cross-Ownership Rules,
Sections 63.54 - 63.58

ORDER

Adopted: September 18, 1992; Released: September 24, 1992

By the Chief, Common Carrier Bureau:

1. In its *Second Further Notice of Proposed Rulemaking* (*Notice*), adopted July 16, 1992, the Commission requested comment on proposed rule changes by September 28, 1992, and reply comments by October 28, 1992. The proposed changes deal with the population eligibility requirements in the rural exemption to the telephone company-cable television cross ownership restriction.

2. On September 15, 1992 the National Cable Television Association, Inc. (NCTA) requested a two-week extension of time to file comments because it states it needs this additional time to complete a population research study that will provide important factual evidence relating to the proposed rule changes.

3. In its *Notice* the Commission states its goal of bringing "the deployment of wired cable services as close to 100 percent of American households as possible." To fulfill this goal the Commission seeks comments on "the nature of the rural areas which remain unserved" by cable. *Notice*, at para. 151. NCTA states that its completed study will provide new factual information on the current deployment of cable in rural areas.

4. Good cause having been shown, IT IS ORDERED, THAT comments in the referenced proceeding are due **October 13, 1992**, and reply comments are due **November 12, 1992.**

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 23, 1992

COMMON CARRIER BUREAU ESTABLISHES DATA BASE FOR PUBLIC USE IN THE PRICE CAP PERFORMANCE REVIEW FOR AT&T (CC DOCKET NO. 92-134)

The Common Carrier Bureau has established a computerized data base for use in the Price Cap Performance Review for AT&T (CC Docket No. 92-134). This data base is located in the Industry Analysis Division's "FCC-State Link Bulletin Board System" (RBBS-PC).

This 24-hour bulletin board is restricted to FCC use from 9:30 am - 10:30 am and 1:00 pm - 1:30 pm EST. From 8:00 am - 9:30 am and 10:30 am to 1:00 pm EST, the system serves regulatory commissions and other government agencies as priority users, and is not available to other users. The board is available to the public (as well as government users) from 1:30 pm - 8:00 am EST.

Users can access this bulletin board by calling (202) 632-1361. Information on the use of this board is available for downloading in a file called RBBS-PC.REF in the BBS directory of this board. Information on various aspects of this board is found in the BULLETIN titled "INFO." In-depth information about commands, menus, and special topics can be acquired by using the online HELP system. Specific questions can be forwarded as a message to the System Operator by using the "Enter Message" command from the MAIN menu. Questions regarding use of this bulletin board may also be directed to the Industry Analysis Division at (202) 632-0745.

As noted in the Notice of Inquiry initiating the price cap performance review for AT&T (7 FCC Rcd 5322 (1992)), the Commission is using this proceeding as a test of methods to improve the ability of the Commission and the public to review and evaluate data and information through the use of computerized data bases. Of the eight parties that filed comments in CC Docket 92-134, four also filed their comments on computer diskettes for inclusion in the data base. Reply comments are due **October 5, 1992.** We encourage all commenters to submit, in addition to the required paper copies, a copy of their reply comments to the Office of the Secretary on IBM-PC compatible diskettes with text files in two formats, one compatible with WordPerfect 5.1 or 4.2 and one in ASCII, and spreadsheets in a Lotus 1-2-3 WK1 or WK3 file, so that they may be included in the data base.

For further information, call Norma Bell, Tariff Division, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-78

In the Matter of

Amendment of Part 90 of the Commission's Rules Pertaining to End User and Mobile Licensing Information.	RM-7407 RM-7749

REPORT AND ORDER

Adopted: September 17, 1992; Released: October 2, 1992

By the Commission:

I. INTRODUCTION

1. This *Report and Order* amends Part 90 of our Rules to eliminate or modify various regulations that impose unnecessary burdens on private land mobile licensees. First, we are eliminating the requirement that licensees of shared systems that do not individually license their end users maintain and periodically furnish detailed information about their customers. Second, we are replacing the requirement that certain private land mobile licensees file license modification applications when there is a change in the number of authorized paging or mobile units with less burdensome procedures that will yield more accurate spectrum utilization information.

II. BACKGROUND

2. *The Relevant Rules.* Section 90.179(e) of the Commission's Rules requires that applicants for shared stations[1] submit an "end user list" with their applications. This list must contain the names, addresses, contact persons, and phone numbers for all proposed system users, the nature of each user's business or activity, and the number of mobiles and control stations each user will initially place into operation. The licensee is also required to submit an updated version of the end user list to the applicable frequency coordinator eight months after license grant, annually thereafter, and whenever the system's total mobile and control station count decreases by 20 percent from the licensee's current authorization.

3. Section 90.135 of the Commission's Rules describes the various changes in licensed facilities that require license modification. Unlike Section 90.179, which applies only to licensees of shared systems, Section 90.135 applies to all Part 90 licensees. At issue in this proceeding are Section 90.135(a)(8),[2] which requires license modification when there is a change of 50 or more units in the number of authorized pagers, and Section 90.135(a)(5),[3] which mandates license modification when there is a change in, among other things, the number of authorized mobiles. Also relevant to this proceeding is Section 90.127(c), which applies to all applicants for Part 90 licenses, and instructs each applicant to limit its request for authorized mobile transmitters to the number that will be in use within eight months of the authorization date.[4]

4. *Notice of Proposed Rule Making.* On April 9, 1992, we adopted a *Notice of Proposed Rule Making* (*Notice*)[5] that proposed to (a) eliminate the end user list requirement imposed on licensees of shared systems that do not license their end users;[6] (b) require systems operating on paging-only channels to modify their licenses only when the number of pagers increases or decreases by 35 percent; (c) require systems operating on two-way channels to modify their licenses when the number of mobiles increases or decreases by 20 percent;[7] and (d) under certain circumstances, permit licensees to file applications for license modification to reflect a change in the number of pagers or mobiles directly with the Commission rather than through a frequency coordinator.[8] We also requested comment on whether license modification to reflect a change in the number of mobile or paging units should be required only at the time of license renewal. We excluded from the scope of our license modification proposals those systems licensed in the 470-512 MHz and 800/900 MHz bands that have not earned exclusive use of their channels. Fourteen comments and five reply comments were filed in response to the *Notice*.[9]

III. DISCUSSION

The End User List Requirements

5. *Proposal.* The *Notice* tentatively concluded that the end user list serves no useful administrative purpose for the Commission in processing and licensing private land mobile radio systems.[10] The *Notice* further concluded that end user lists are not essential to the frequency coordina-

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[1] Our rules permit sharing of licensed facilities among eligible users on either a not-for-profit, cost-shared basis or a for-profit private carrier basis. *See generally*, 47 C.F.R. § 90.179. The end users sharing a system may choose to be individually licensed or may opt for an arrangement where only the base station licensee obtains all required authorizations, including those necessary to operate mobiles on the system. A station is considered shared when end users not licensed to operate a base station are capable of remotely operating the base station for their own purposes pursuant to the base station licensee's authorization. 47 C.F.R. § 90.179. *See also* Telocator Network of America v. FCC, 761 F.2d 763 (D.C. Cir. 1985).

[2] 47 C.F.R. § 90.135(a)(8).

[3] 47 C.F.R. § 90.135(a)(5).

[4] Applicants in the Public Safety Radio Services, governmental applicants in the Special Emergency Radio Service, and applicants that are licensed pursuant to an extended implementation schedule are subject to different requirements. 47 C.F.R. §§ 90.129 (c)(3) and (4).

[5] Notice of Proposed Rule Making, PR Docket No. 92-78, 7 FCC Rcd 2877 (1992).

[6] *Notice* at 2880.

[7] *Notice* at 2880 - 2881.

[8] *Notice* at 2882.

[9] The *Notice* established June 26, 1992, and July 13, 1992, as the filing dates for comments and replies, respectively. *See* Appendix B for a list of parties filing comments and replies.

[10] 7 FCC Rcd at 2879.

tors' functions because coordinators obtain necessary spectrum utilization information through the license modification process.[11] In this respect, we observed that it is unclear whether licensees are submitting end user lists to coordinators on an annual basis and that we have no mechanism for assuring compliance with this aspect of Section 90.179(e).[12] We therefore proposed to eliminate all requirements that end user lists be submitted to us as part of the application process or subsequently to coordinators, and requested comment on public interest considerations that might outweigh our assessment that the regulatory burden imposed by end user submissions is unjustified. We reminded licensees that even if end user lists were eliminated, the Commission can and will request end user information from licensees in order to confirm end user eligibility.[13]

6. *Comments.* All commenters supported elimination of the requirement that an end user list be submitted with the initial license application.[14] Other commenters also supported eliminating the periodic submission of end user lists to frequency coordinators.[15] In support of the latter position, one commenter contended that end user lists do not adequately show the level of usage of a frequency,[16] while other commenters expressed concern about the potential for infringement of customer data confidentiality through misuse of end user lists.[17]

7. *Discussion.* Our objective in this proceeding is to develop regulations that will meet our needs and the needs of the coordinators without imposing an undue burden on the public. Virtually all the commenters support our proposal to eliminate the submission of end user lists both to the Commission and to frequency coordinators.[18] After considering the unanimity of comments submitted recommending termination of the end user list requirement, we have decided to adopt the proposal set forth in the *Notice* and eliminate the end user lists, which we consider to be an unnecessary regulatory burden imposed on our licensees by the current Rule.[19] Consistent with our objective to minimize unnecessary regulatory burdens on the public, we will instead request only that information needed to enable us to fulfill our spectrum management obligations and simultaneously enable the coordinators to meet their frequency coordination functions.

8. In this regard, we agree with NABER's Reply Comments and Columbia's Comments that the number of mobiles or pagers is the information provided in the end user list that is most relevant to any determination of spectrum utilization by the frequency coordinators.[20] This information, however, can be obtained through the license modification process. It is therefore apparent that the end user list requirement should be eliminated because it elicits information that is redundant of information we are able to collect through other, less burdensome regulatory mechanisms.[21] As indicated by the dicussion that follows, we conclude that information regarding spectrum utilization can be provided to us and the coordinators in a more reliable and less burdensome form through revised license

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[11] *Id.* at 2880.

[12] *Id.* at n.32.

[13] *Id.*

[14] The Utilities Telecommunications Council (UTC) Comments at 2, Columbia Communications, Inc., *et al.* (Columbia) Comments at 1, Celpage, Inc. (Celpage) Comments at 3-4, The Association of American Railroads (AAR) Comments at 3, Brown and Schwaninger (B&S) Comments at 2, The Special Industrial Radio Service Association, Inc. (SIRSA) Comments at 4. The National Association of Business and Educational Radio, Inc. (NABER) agrees that there is no need for most of the information required by end user lists for private carrier paging systems (PCP), but maintains that information about the number of users by paging format is significant to spectrum utilization and should be submitted with the application, at the eight-month construction benchmark, and then annually. NABER states that the information could be provided directly to the Commission with a copy to the coordinator, or directly to the coordinator, which could enter the information in its data base with no additional fee. NABER Reply Comments at 3-4. We note that NABER continues to assume that all PCP licensees are required to submit end user lists to coordinators on an annual basis. However, only *shared* PCP systems, of which there are very few, are subject to the end user requirements of § 90.179(e). *See Notice*, 7 FCC Rcd at 2880 n.38, and Attachment to NABER Comments (example of shared PCP that *is* subject to end user list requirement). NABER's concerns regarding the need for end user information for systems licensed on paging-only channels will be addressed in the context of our later discussion on license modification requirements. *See* paras. 11-14, *infra*.

[15] SIRSA Comments at 5, UTC Comments at 2, Columbia Comments at 4, and B&S Comments at 2.

[16] Columbia Comments at 2.

[17] Celpage Comments at 4-5, B&S Comments at 2-3, and Columbia Comments at 3. *Cf.* UTC Comments at 3, and SIRSA Comments at 5 (little risk of coordinators' infringing on confidentiality).

[18] As a separate matter, GTE Mobilnet Inc. and Contel Cellular Inc. (GTE and Contel) filed joint comments indicating that the proposal to eliminate end user lists is a change in the SMR regulatory scheme that would blur the distinction between SMR and common carrier wireless services. GTE and Contel urge the Commission to address the distinction between private and common carrier wireless services before taking any action in this proceeding. GTE and Contel Comments at 2-3. SIRSA responds that Section 90.179 of the rules does not apply to SMR systems and that delay in this action would be adverse to the public interest since the private/common carrier issue would be more properly addressed in another proceeding. SIRSA Reply Comments at 4. We agree with SIRSA's Reply Comments that this proceeding should be resolved expeditiously without consideration of extraneous issues that would be more appropriately addressed elsewhere.

[19] Eliminating end user lists also solves the concerns of list confidentiality raised by various commenters. *See* Celpage Comments at 4-5, B&S Comments at 2-3, and Columbia Comments at 3.

[20] NABER Reply Comments at 3-4, and Columbia Comments at 2.

[21] AAR expressed concern that the applicants or licensees may overstate the number of end users on their systems to limit the amount of sharing on their channels. AAR Comments at 3. SIRSA also requests that end user lists be retained for non-profit cooperative systems operating shared channels above 800 MHz to ensure that frequency requests are not overstated. SIRSA Comments at 4. Information regarding eligibility of end users and confirmation of whether a system is really serving those end users or is "paper loading" are important parts of our spectrum management responsibilities. These issues, however, generally arise in the context of a compliance action and, in such instances, we obtain information directly from the licensee, pursuant to Section 307(b) of the Communications Act. Getting this information directly from licensees on an as-needed basis would not only help to ensure its accuracy, but would also be less burdensome than an across-the-board annual reporting requirement for all licensees. *See, e.g.,* NABER Reply Comments at 3-4.

modification and license renewal procedures.[22] Coordinators requiring more information than that provided through these new procedures may request that information directly from the licensee. We will not, however, impose any requirement on the licensee to provide such information to the coordinator or to the Commission.

License Modification For Paging and Two-Way Systems

9. *Proposals.* In the *Notice*, we proposed new license modification requirements for both two-way systems and systems operating on paging-only channels. For two-way systems, the current rules require licensees to modify their licenses when *any* change occurs in the number of mobiles on their system. We considered this requirement to be too burdensome and therefore proposed that licensees of two-way systems be required to modify their licenses only when their number of mobiles increased or decreased by 20 percent from that authorized.[23] We asked, alternatively, whether a change in the number of mobile units need only be authorized at the time of license renewal.[24] A current rule also requires licensees to modify their licenses when there is a change of 50 or more in the number of paging receivers operating on their systems. We also considered this rule to be unnecessarily burdensome on our licensees and thus proposed that systems operating on paging-only channels be required to modify their licenses only when their number of pagers increased or decreased by 35 percent.[25] We invited comment on whether this approach would provide adequate information to ensure a reliable indication of channel occupancy. Given that it is our current practice to routinely grant applications to add paging units, we also asked whether there is any need at all for a modification of a system's license when a licensee merely increases the number of pagers on its system.[26]

10. *Comments.* The commenters unanimously support reducing the frequency with which licensees on both two-way and paging-only systems must file license modification applications when there is a change in the number of mobiles or paging units.[27] With regard to paging systems, some commenters, such as SIRSA and The International Municipal Signal Association and the International Association of Fire Chiefs, Inc. (IMSA/IAFC), support the proposal delineated in the *Notice*,[28] while others offer variations on this proposal[29] or suggest different approaches.[30] For example, NABER, PageNet and Celpage recommend an annual reporting requirement indicating the number and type of pagers. Commenters addressing our proposal regarding license modification for two-way systems also offered various alternative proposals. For example, MRFAC suggests that we require license modification whenever the number of mobiles fluctuates by 20 percent or by 100 units, whichever is less.[31] Other commenters support the proposal as delineated in the *Notice*.[32]

11. *Decision.* There is a clear consensus among the commenters for reducing the frequency with which licensees are currently required to modify their licenses when increasing or decreasing their number of mobiles or pagers. We believe that our current license modification requirements are excessively burdensome and are designed to provide far more detailed information about spectrum utilization than we or the coordinators realistically need. Various commenters have offered different license modification or reporting proposals that, they claim, would provide coordinators with adequate information to perform their frequency coordination functions. It is our conclusion that replacing our current procedures with procedures requiring information about numbers of mobiles or pagers only at license modification or renewal will provide information adequate for frequency coordination and licensing. It is also our conclusion that obtaining this information in connection with modifications and renewals is likely to result in a more accurate base of information to support frequency coordination and licensing than the current system.

12. According to our estimates, fewer than one percent of all private land mobile licensees modify their licenses to reflect strictly a change in the number of authorized mobiles or pagers during the course of a given five-year license term. This suggests that an overwhelming majority of private land mobile licensees fail to modify their licenses in accordance with our license modification rules.[33] Furthermore, it is apparent that our existing license modification rules are essentially unenforceable because they would require us to confirm the number of mobiles or pagers associated with hundreds of thousands of licenses on an almost continuous basis.[34] Accordingly, we believe that any new rules must be designed to obtain meaningful

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[22] Even though we are modifying Section 90.135(a), see para. 13, *infra*, to limit the extent to which the licensee must report changes in numbers of mobiles and pagers, we find that even under our modified rules we would have sufficient information for spectrum management purposes.

[23] *Notice* at 2881.

[24] *Id.* We asked further whether the 20 percent figure should apply to two-way systems with paging units.

[25] *Notice* at 2880.

[26] *Notice* at 2881.

[27] *See, e.g.*, Paging Network, Inc. (PageNet) Comments at 4, SIRSA Comments at 6, and Columbia Communications Comments at 9.

[28] SIRSA Comments at 6, and IMSA/IAFC Comments at 5.

[29] For example, UTC favors a 20 percent or 25 percent benchmark figure that would apply only to systems with at least 100 units. *See* UTC Comments at 3.

[30] *See* NABER Comments at 14, PageNet Comments at 7 and Celpage Comments at 6. PacTel Paging (PacTel) suggests that we adopt an approach that would require license modification when a licensee reached a certain percentage (*e.g.*, 20%, 40%) of its total system capacity. *See* PacTel Comments at 7.

[31] MRFAC contends that a straight 20% standard could do more harm than good. It is concerned that this threshold will not keep the coordinators and the Commission adequately apprised of significant changes in numbers of mobiles by large systems. In other words, MRFAC asserts that a change of less than 20% in a system with hundreds of mobiles could be significant and could seriously impact other co-channel users. *See* MRFAC Comments at 3.

[32] SIRSA Comments at 7, APCO Comments at 2, and AAR Comments at 3.

[33] *Accord*, Comments of Mitchell Energy and Development Corp. (Mitchell), indicating that, as a business, because of continual fluctuations in numbers of mobiles, even a 20 percent license modification requirement would call for frequent and burdensome submissions of applications to modify licenses during a typical license term.

[34] Most of our more than 700,000 private land mobile licensees are not in the business of providing communications service, but instead use their communications systems as a tool to promote the efficient operation of their businesses. This apparent failure of accurate information has not led to a disrupted frequency coordination or licensing system.

data relating to the number of mobiles and pagers operating on a system, to impose a minimal regulatory burden on both licensees and this agency, and to be realistically enforceable.

13. While it could be argued that perhaps a less burdensome approach toward license modification, i.e., our "20 percent-change" proposal for two-way systems and our "35 percent-change" proposal for paging systems, could result in better compliance on the part of private land mobile licensees, several commenters argue convincingly that our proposed approaches would remain too burdensome.[35] The alternative put forth by NABER and others to require licensees to report their number of mobiles and pagers annually has significant drawbacks. First, it would be needlessly burdensome to require licensees that neither increase nor decrease their number of mobiles or pagers during the course of a year to make an annual submission to us or to the coordinators.[36] Secondly, enforcement of such a requirement would strain our already-limited staff resources.

14. We have carefully considered the views expressed in the comments in our effort to develop the most efficient and least burdensome method for acquiring information on the numbers of mobiles and paging receivers[37] operating on private land mobile channels. Section 90.127(c) currently stipulates that applicants for private land mobile licenses shall limit their requests for authorized mobile transmitters to the number of transmitters they expect to put into use within eight months of station authorization. As a consequence of this rule, applicants must provide us and the coordinators with an assessment of their initial loading levels.[38] We conclude that the most reliable procedure for ensuring that licensees inform us and the coordinators of changes in the number of authorized mobiles and pagers is through a requirement that licensees provide this information 1) whenever they request a license modification[39] and 2) at license renewal.[40]

15. Adoption of this procedure will provide coordinators with more accurate data than they now acquire under our current rules and will significantly reduce the existing license modification burden on our licensees.[41] Our experience is that private land mobile licensees typically request license modification at least once during their five-year license term. This new procedure, therefore, should provide both us and the coordinators with sufficient information on spectrum usage.[42] For licensees that do not request license modifications during their license terms, information regarding their number of mobiles and pagers will be provided, at a minimum, at the five-year license renewal date. This may appear, at first glance, to be too infrequent a time period for obtaining this information for spectrum management purposes. When we consider, however, that under our existing rules, which would require substantial resources to assure full compliance, many private land mobile licensees may have significantly changed numbers of mobiles or pagers and may not have provided the required information as to those changes, these new procedures represent a significant improvement over the exist-

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[35] *See, e.g.*, Comments of PageNet and Mitchell.

[36] NABER, in reply comments, acknowledges that the Commission would be required to have an enforcement mechanism in place to detect licensees who fail to file the proposed annual reports. *See* NABER Reply Comments at note 3.

[37] We will not, as suggested by some commenters, require licensees on paging-only channels to report the type of system on a periodic basis. There is no need to indicate the type of paging system (e.g., digital or analog) because this can be readily determined from the emission designator on a licensee's initial application. Any subsequent change in a system's type of emission is subject to license modification, pursuant to Section 90.135(a)(2).

[38] It has also been the Commission's long-standing practice, which has received industry-wide acceptance, to apply this rule not just to mobiles but to pagers as well and thereby allow applicants for paging systems to request authorization for the number of pagers that they expect to put into use within eight months of their authorization date. We will therefore clarify Section 90.127 to reflect this practice.

[39] Licensees must request license modifications for those changes in facilities identified in Section 90.135(a) of our Rules, as amended. Currently, licensees are not required to provide information on their number of mobiles or pagers upon renewal or when requesting license modifications. Our records, however, indicate that our licensees, as a matter of course, identify their number of mobiles and pagers when applying for license modifications.

[40] In order to maintain the integrity of our licensing records, we will continue, as indicated in the *Notice*, to require licensees of systems operating in the 470-512 MHz band and on conventional channels above 800 MHz to modify their licenses in accordance with our current rule as long as the number of mobiles operating on the channel is below the number needed to obtain channel exclusivity. *See* 47 C.F.R. §§ 90.113 and 90.621(a)(2). Also, we decline in this proceeding to establish a signalling standard for systems operating on paging-only channels. A majority of commenters opposing adoption of a signalling standard contend that such a procedure would be too complicated. *See* B&S at 4-6, SIRSA Comments at 6-7, and Celpage Comments at 11. They also question whether the Commission could reliably measure use by this method. *See* SIRSA Comments at 6-7. We agree with these comments and thus will not pursue the signalling standard proposal at this time. Finally, we agree with Reply Comments that PacTel's alternative approach requiring license modification based on changes in channel utilization expressed as a percentage of total channel capacity, and demonstrated by traffic load studies filed with the application, would be unnecessarily burdensome to both licensees and the Commission. *See* PageNet Reply Comments at 7-8, SIRSA Reply Comments at 5, and NABER Reply Comments at 3.

[41] The only "burden" on our licensees will now be to indicate on the FCC application form the number of mobiles or pagers that are in use on their systems. Currently, licensees requesting license modifications, do so by filing a Form 574. This form currently asks for information on numbers of mobiles and pagers (Box #12). Licensees requesting license renewal may submit either a Form 574-R or a Form 405-A. Neither of these forms currently asks for numbers of mobiles or pagers, but we plan to revise these forms in the near future. Until the Forms 574-R and 405-A are revised, however, applicants for license renewals will be required to file Form 574 (in accordance with Section 90.119(a)(3)) instead of the Forms 574-R or 405-A and must indicate on the Form 574 their current number of mobiles or pagers. Licensees filing a Form 574 for license renewal, in addition to providing information on numbers of mobiles or pagers (Box #12), will only have to provide the information required by Boxes #21, #22, #23, #24, #25, #32, #36, and #37.

[42] We recognize that if private carrier paging licensees in the 900 MHz band were permitted to earn channel exclusivity, as proposed by NABER in its Petition for Rule Making (RM-7986), license modification for such licensees might no longer be necessary.

ing rules. We believe that the reduced burden that will occur as a result of our new procedures will lead to greater compliance on the part of our licensees and that this will result in a more accurate data base on spectrum usage. We conclude, therefore, that these new procedures will both improve the spectrum management and frequency coordination processes and, at the same time, relieve us and the private land mobile industry of unnecessary burdens.[43]

IV. CONCLUSION

16. We are eliminating or modifying various rules that impose unnecessary regulatory burdens on private land mobile licensees. Only that information deemed essential to the fulfillment of our obligation to ensure efficient use of the spectrum, and the coordinators' functions regarding recommendation of frequencies, will now be required. Our rule amendments will provide more efficient and effective licensing procedures thus serving the needs of the public, the industry, and the Commission.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

17. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

Need and Purpose of the Action

18. The Commission is adopting these rule changes to eliminate unnecessary regulatory burdens on private land mobile licensees, many of whom are small business entities. This action will provide more efficient and effective licensing procedures thus serving the public, the industry and the Commission.

Issues Raised in Response to the Initial Regulatory Flexibility Analysis

19. There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

Significant Alternatives Considered and Rejected

20. All significant alternatives have been addressed in this Report and Order.

VI. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r) and 332(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 303(r) and 332(a), Part 90 of the Commission's Rules, 47 C.F.R. Part 90, IS AMENDED as set forth in the Appendix below, effective [ninety days after publication in the Federal Register].

22. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

23. For further information concerning this *Report and Order*, contact Freda Lippert Thyden or Tatsu Kondo, Land Mobile and Microwave Division, Private Radio Bureau, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

47 CFR Part 90 is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303, and 332, unless otherwise noted.

2. 47 C.F.R. § 90.127 is amended by adding new paragraph (e) and revising paragraphs (c) introductory paragraph, (c)(1) and (c)(2) to read as follows:

§ 90.127 Submission and filing of applications.

* * * * *

(c) Each application shall limit its request for authorized mobile transmitters and paging receivers to:

(1) Mobile transmitters and paging receivers that will be installed and operated immediately after authorization issuance.

(2) Mobile transmitters and paging receivers for which purchase orders have already been signed and which will be in use within eight months of the authorization date.

* * * * *

(e) All applications for modification of license and renewal of license must include the number of mobile transmitters and paging receivers in use on the licensed facilities.

3. 47 C.F.R. § 90.135 is amended by deleting paragraph (a)(8) and by revising paragraph (a)(5) to read as follows:

§ 90.135 Modification of license.

[43] We note that if frequency coordinators believe that this procedure will not provide them with sufficient mobile and pager information, they may obtain additional information directly from licensees as the need arises. Also, if licensees believe that their facilities will be better protected from interference if their licenses reflect actual numbers of mobile or paging units, licensees are free to modify their licenses more frequently than our new procedure prescribes. If a licensee does request license modification strictly for a change in number of mobiles or pagers, there is no need for these applications to be processed by a coordinator and the applications may therefore be filed directly with the Commission, with a copy of the application sent to the relevant coordinator. If, however, an applicant wishes to file its license modification request through a coordinator to take advantage of the various forms of assistance offered by coordinators, the applicant is free to do so.

* * * * *

(a)(5) Change in the authorized location or number of base stations, fixed, control or, for systems operating on non-exclusive assignments in the 470-512 MHz, 800 MHz or 900 MHz bands, a change in the number of mobile transmitters, or a change in the area of mobile operations from that authorized.

* * * * *

4. 47 C.F.R. § 90.175 is amended by adding new paragraph (g) to read as follows:

§ 90.175 Frequency coordination requirements.

* * * * *

(g) Applications for modification of license that only involve a change in the number of mobile transmitters or paging receivers from that authorized, except for systems operating on non-exclusive assignments in the 470-512 MHz, 800 MHz or 900 MHz bands, need not be accompanied by evidence of frequency coordination, but a copy of these applications must be sent to the applicable frequency coordinator at the same time they are filed with the Commission.

5. 47 C.F.R. § 90.179 is revised by removing paragraph (e) and redesignating paragraphs (f) and (g) as (e) and (f), respectively.

APPENDIX B

List of Parties Filing Comments

The Associated Public-Safety Communications Officers, Inc.

The Association of American Railroads

Brown and Schwaninger

Celpage, Inc.

Columbia Communications, Inc., Communications Center, Inc., Communications Ventures, Inc., Kentec Communications, Inc., Madera Radio Dispatch, Inc., Mobile Communications, Inc., Nu-Page of Winder, Paging Plus, and Tri-City Beepers, Inc.

GTE Mobilnet Inc., and Contel Cellular, Inc.

The International Municipal Signal Association and the International Association of Fire Chiefs, Inc.

Manufacturers Radio Frequency Advisory Committee, Inc.

Mitchell Energy and Development

The National Association of Business and Educational Radio, Inc.

PacTel Paging

Paging Network, Inc.

The Special Industrial Radio Service Association, Inc.

The Utilities Telecommunications Council

List of Parties Filing Reply Comments

Manufacturers Radio Frequency Advisory Committee, Inc.

The National Association of Business and Educational Radio, Inc.

PacTel Paging

Paging Network, Inc.

The Special Industrial Radio Service Association, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 24, 1992

Released: October 1, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Oak Ridge FM, Inc.	8210-BH
Licensee, Station WOKI-FM	C8-1190
1900 Winston Rd, STE.600	C12-502
Knoxville, TN 37919	C12-572

Dear Sir or Madam:

This letter constitutes a Notice of Apparent Liability for a forfeiture in the amount of six thousand, two hundred and fifty dollars ($6,250) pursuant to Section 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and Section 73.1211 of the Commission's Rules. This action is being taken by the Chief of the Mass Media Bureau pursuant to the delegation of authority in Section 0.283 of the Commission's Rules.

On October 29, 1991, the Commission sent you a letter of inquiry concerning information it received alleging that Station WOKI-FM had broadcast advertisements for the Kentucky state lottery. You responded by letter dated December 5, 1991, and, as indicated in your response, counsel for the Kentucky Lottery Corporation (the "Corporation") provided comments to assist the Commission in resolving this matter. Your response noted that, while our letter of inquiry referred to the "Kentucky state lottery," your station broadcast commercials for the "Kentucky Lottery," which you assert is conducted by the Kentucky Lottery Corporation, not the State of Kentucky. You provided records which indicate that you broadcast commercials for the Kentucky Lottery at various times between April 4, 1991, and October 23, 1991. You stated that you immediately suspended broadcasts of these commercials when you first learned that the Commission had concerns about these broadcasts.

Your response noted that your station's signal extends well into the State of Kentucky and you included excerpts from the 1991 edition of Arbitron's radio county coverage "county reports" to demonstrate the level of listenership your station achieved in various Kentucky counties. You also explained that you "tagged" each of the subject announcements with a reminder that the lottery is limited to tickets purchased in Kentucky and that the lottery is legal only in Kentucky.

The principal argument you presented for denying liability was your assertion that the Commission's investigation is based on the wrong subsection of 18 U.S.C. Section 1307. You state that the Kentucky Lottery is not conducted by the State of Kentucky but, instead, is conducted by a non-profit corporation operating as a quasi-government agency and, therefore, qualifies for the exemption from 18 U.S.C. Section 1304 that is provided in 18 U.S.C. Section 1307(a)(2)(A). If the Kentucky Lottery were conducted by the State of Kentucky, the applicable exemption from Section 1304 would be Section 1307(a)(1)(B), rather than Section 1307(a)(2)(A). You point out that the difference in these subsections of Section 1307 is that a lottery conducted by a state may be advertised only by a station licensed in a state that has a state-conducted lottery (Tennessee is not such a state) while a lottery conducted by a governmental or non-profit organization may be broadcast advertised without violating federal law, so long as the lottery is authorized or not otherwise prohibited by the state in which it is conducted.

In support of your argument, you included with your response a letter from Keith B. Hunter, General Counsel for the Kentucky Lottery Corporation, stating that the Corporation considers itself to be a non-profit corporation operating as a quasi-government agency. Further, your response was supplemented by a letter from Eric L. Bernthal, an attorney writing on behalf of the Corporation. Mr. Bernthal argues that the applicable statute for exempting the Kentucky Lottery is Section 1307(a)(2)(A) because (1) the State of Kentucky does not conduct the Kentucky Lottery; (2) the Corporation is a governmental organization; and (3) the Corporation conducts the Kentucky Lottery.

Mr. Bernthal's argument relies on the assertion that "[a]n examination of the statute authorizing the lottery explicitly states that the lottery is to be controlled and operated by "an *independent, de jure municipal corporation* and political subdivision of the Commonwealth of Kentucky" (the "Corporation"), as opposed to the state itself. KRS Section 154A.020 (emphasis added)." Contrary to Mr. Bernthal's assertion, KRS 154A.020 does not explicitly state that the Corporation shall control or operate the Kentucky Lottery. KRS Section 154A.020 states, in part:

> There is hereby created and established a state lottery which shall be administered by an independent, de jure municipal corporation and political subdivision of the Commonwealth of Kentucky which shall be a public body corporate and politic to be known as the Kentucky lottery corporation. . . . The general assembly hereby recognizes that the operations of a lottery are unique activities for state government and that a corporate structure will best enable the lottery to be managed in an entreprenurial and business-like manner. . . . It is also the intent of the general assembly that the Kentucky lottery corporation shall be accountable to the governor, the general assembly and the people of the Commonwealth through a system of audits, reports and thorough financial disclosure as required by this chapter.

This statute appears to have been enacted pursuant to Section 226(1) of the Kentucky Constitution, which reads:

> The general assembly may establish a Kentucky state lottery and may establish a state lottery to be conducted in cooperation with other states. Any lottery so established shall be operated by or on behalf of the Commonwealth of Kentucky.

We note that the letter that was submitted on behalf of the Corporation by its General Counsel, Mr. Hunter, states that the Corporation is a quasi-government agency. The

letter from Mr. Bernthal argues that this "quasi-government agency" should be treated as a governmental organization for purposes of Section 1307(a)(2)(A). You have not presented any argument or authority to indicate that, were we to conclude that the Kentucky Lottery is not a state-conducted lottery, a quasi-government agency (the Corporation) should be treated as a government organization for purposes of Section 1307(a)(2)(A).[1] In any event, we need not resolve that question, since we find that the Kentucky Lottery, as authorized by the Kentucky Constitution and established by the laws of Kentucky, is a state-conducted lottery.

In determining that the Kentucky Lottery is a state-conducted lottery, as that term is used in Section 1307(a)(1)(B), we are guided by the meaning given that term when Congress enacted the original version of Section 1307 in December 1974. *See, Letter to Roger W. Hirsch* (Mass Media Bureau, February 13, 1991).[2] In the legislative history of the enactment of Section 1307, a prime concern of Congress was to minimize private gain from lotteries, as well as to deter criminal involvement and keep the games honest. We find the Kentucky legislation, enacted pursuant to a constitutional amendment authorizing a "Kentucky state lottery," conforms to that standard.[3] Our conclusion is based on the language, cited above, in KRS Section 154A.020 that describes the venture as a state lottery and makes the Corporation accountable to the governor, the general assembly and the people of the Commonwealth through a system of audits, reports and thorough financial disclosures. Such disclosures are required by, *e.g.*, KRS Section 154A.060(g)(2)(b) (requiring submission of monthly and annual financial reports) and KRS Section 154A.130(3) (making the auditor of public accounts responsible for a financial postaudit of the books and records of the Corporation).

Additionally, Mr. Bernthal appears to argue that we should not impose a sanction for any possible violation of 18 U.S.C. Section 1304 in order to avoid a challenge to the constitutionality of that statute. We find this argument unpersuasive. Finally, Mr. Bernthal cites *Edge Broadcasting Co. v. United States*, 732 F. Supp. 633 (E.D. Va. 1990), *aff'd* 956 F.2d 263 (4th Cir. 1992), a case in which the federal courts in the Fourth Circuit found, based upon a set of specific facts and circumstances, that Sections 1304 and 1307 did not apply to one radio station in that circuit, WMYK-FM. Neither Mr. Bernthal's assertion that "WOKI serves a substantial listenership in Kentucky," nor the information that you provided concerning the listenership that your station enjoys within Kentucky convinces us that the *Edge* case should be extended beyond the unique circumstances contained therein.

Thus, it appears that Station WOKI-FM willfully and repeatedly violated 18 U.S.C. Section 1304 and 47 C.F.R. Section 73.1211 from April 4, 1991, until October 23, 1991. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Oak Ridge FM, Inc. is hereby advised of its apparent liablity for a forfeiture of six thousand, two hundred and fifty dollars ($6,250).

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, FCC 92-212 (released June 4, 1992). Under these standards, $6,250 is the base forfeiture for a lottery violation.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] Mr. Bernthal also provides exerpts from publications that compare the Corporation to "a quasi-private corporation" and describe the Corporation as "a quasi-public corporation," again, without addressing the applicability of Section 1307(a)(2)(A) to these types of institutions.

[2] Our letter to Mr. Hirsch found that certain "pickle card games," authorized by Nebraska's County and City Lottery Act were not "conducted" by counties that were authorized to conduct certain lotteries under that Act. Our reason for so finding was that "an independent contractor, rather than an appointed authority, appears to run the day to day operations." Unlike the situation in Nebraska, we find the Corporation to be an appointed authority, and not an independent contractor. *See*, KRS Section 154A.030.

[3] So too, was the "bookkeeping and accounting" done by the South Dakota Lottery, a state agency created by the South Dakota legislature to have overall management and control over South Dakota's video lottery, a key factor in our determination that the video lottery was a state-conducted lottery. *See, Letter to Lee M. McCahren, Esq.* (Mass Media Bureau, March 8, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Requests by Texas Telecasting, Inc., and Freedom-TV Sub, Inc., for Waiver of Section 73.658(m) of the Commission's Rules to Include Station KVHP(TV), Lake Charles, Louisiana, in the Beaumont-Port Arthur, Texas, Market

MMB File No. 891226A

MEMORANDUM OPINION AND ORDER

Adopted: September 18, 1992; Released: October 1, 1992

By the Commission:

INTRODUCTION

1. Texas Telecasting, Inc. ("Texas Telecasting"), licensee of ABC affiliate Station KBMT(TV), Channel 12, Beaumont, Texas, has filed a Petition for Special Relief, requesting that it be permitted to purchase program exclusivity rights against independent (Fox) Station KVHP(TV), Channel 29, Lake Charles, Louisiana, notwithstanding the fact that Lake Charles lies outside the zone for which Beaumont stations can purchase exclusivity under Section 73.658(m) of the Commission's Rules. Freedom-TV Sub, Inc. ("Freedom-TV"), licensee of CBS affiliate Station KFDM(TV), Channel 6, Beaumont, Texas, filed comments in support of Texas Telecasting's Petition and requested the same relief. KVHP-TV Limited Partners ("KVHP-TV Partners"), the owner of Station KVHP, opposes the Petition in order to preserve its station's Section 73.658(m) protection. We deny the requests of Texas Telecasting and Freedom-TV because the relief sought is not warranted by the facts and is contrary to the purpose of Section 73.658(m). KVHP, which is licensed to a community that is outside the Section 73.658(m) territorial exclusivity zone, is the type of station that Section 73.658(m) was designed to protect.

BACKGROUND

2. Section 73.658(m) of the Commission's Rules, known as the "nonnetwork territorial exclusivity rule," generally precludes a television station from purchasing exclusive rights to non-network programming against other television stations licensed to communities located more than 35 miles away. 47 C.F.R. § 73.658(m). This Section contains an exception that allows a station in a hyphenated market to purchase exclusivity against any other station licensed to a designated community in that hyphenated market, even if the stations are more than 35 miles apart.

3. KVHP is licensed to Lake Charles, Louisiana, which is 54 miles east of Beaumont, Texas, and is outside the Beaumont-Port Arthur hyphenated market. Lake Charles is itself a distinct market. Therefore, KVHP is outside of the area for which Beaumont stations can purchase nonnetwork exclusivity rights pursuant to Section 73.658(m). The Beaumont-Port Arthur market is currently ranked 133 by the ARB Television Market Analysis, while the Lake Charles market is ranked 173.[1] Texas Telecasting's station, KBMT, is a network-affiliated, VHF station and is carried on the Beaumont area cable system and on the Lake Charles area cable system. KVHP is an independent (Fox), UHF station, carried on the Lake Charles area cable system, but not on the Beaumont area cable system.

4. In addition to KVHP-TV Partners, Southern Broadcasting Corporation of Sarasota ("Southern") also opposes Texas Telecasting's Petition.[2] Both KVHP-TV Partners and Southern assert that the requested relief is not warranted by the facts and would be contrary to the purpose of Section 73.658(m). Another commenter, Cosmos Broadcasting Corporation ("Cosmos"), licensee of NBC affiliate Station KPLC(TV), Channel 7, Lake Charles, Louisiana, contends that the requested relief, if granted, would unfairly alter the balance of competition between stations in the Lake Charles community.[3]

5. In October 1989, KVHP moved its transmitter to a site midway between Beaumont and Lake Charles, and just 34 miles away from the Beaumont point of reference. From its new transmitter location, KVHP's City Grade contour includes part of Beaumont, and its Grade A contour encompasses all of Beaumont. Texas Telecasting asserts that as a result of KVHP's decision to relocate its transmitter, KVHP has become an integral part of the Beaumont-Port Arthur market and should thus be subject to territorial exclusivity rights purchased for that market. Texas Telecasting does not seek to obtain exclusivity rights against any other station serving the Lake Charles market, only against KVHP.

---

[1] We refer to these market rankings for comparison purposes only, so that we may compare rankings from the same source. Strictly speaking, in identifying hyphenated markets for purposes of applying the territorial exclusivity rule, that rule first calls for reference to Section 76.51 of our Rules, which contains a listing of the top 100 markets, and then to the ARB Television Market Analysis for all stations below the top 100. *See* 47 C.F.R. § 73.658(m). In fact, Section 76.51 lists the Beaumont-Port Arthur market as 88, while Lake Charles, which does not appear on the list, is ranked as 173 by the ARB Television Market Analysis.

[2] Southern is the licensee of Station WWSB(TV), Sarasota, Florida, and has filed comments in Gen. Docket No. 87-24, a pending rulemaking proceeding that raises more general issues related to those discussed here (*i.e.*, whether to modify the scope of exclusivity under the territorial and syndicated exclusivity rules and the market designations used with respect to these rules).

[3] Cosmos requests that if we grant the relief requested by Texas Telecasting, we make clear that KBMT will not be entitled to seek program exclusivity against KPLC, and that KPLC will continue to be entitled to seek program exclusivity against KVHP. Cosmos also asserts that if we extend the area in which KVHP is entitled program exclusivity, we must grant similar relief to KPLC.

DISCUSSION

6. The question presented here is whether KVHP, a Lake Charles station, should be considered a part of the Beaumont-Port Arthur market for purposes of Section 73.658(m). That Section was designed to facilitate the acquisition of non-network programming by stations in "overshadowed" or "fringe" markets, while allowing stations located within the same television market to acquire exclusive rights to syndicated programs against one another. Section 73.658(m) states in relevant part:

> No television station shall enter into any contract, arrangement, or understanding, expressed or implied; with a non-network program producer, distributor, or supplier, or other person; which prevents or hinders another television station located in a community over 56.3 kilometers (35 miles) away, as determined by the reference points contained in § 76.53 of this chapter... from broadcasting any program purchased by the former station from such non-network program producer, distributor, supplier, or other person, except that a television station may secure exclusivity against a television station licensed to another designated community in a hyphenated market specified in the market listing as contained in § 76.51 of this chapter for those 100 markets listed, and for markets not listed in § 76.51 of this chapter, the listing as contained in the ARB Television Market Analysis for the most recent year at the time that the exclusivity contract, arrangement or understanding is complete under practices of the industry.

47 C.F.R. § 73.658(m)(1).

7. Texas Telecasting maintains that the purpose of Section 73.658(m) is to allow stations to obtain program exclusivity against other competing stations within the same television market, and that this purpose is contravened by the factual situation arising from KVHP's relocation of its transmitter facilities. Texas Telecasting contends that its expectation of exclusivity, with respect to syndicated programs for which it purchased exclusive broadcast rights, has been destroyed by KVHP's decision to compete in the Beaumont market.[4] In support of its Petition, Texas Telecasting relies on our decision in *Press Television Corp.*, 4 FCC Rcd 8799 (1989), *petition for reconsideration denied*, 6 FCC Rcd 6563 (1991), stating that "[t]he Commission's rationale in *Press* is fully applicable to the case of KVHP, where the station has, by its own decision, chosen to become a player in the Beaumont television market." Texas Telecasting's Supplement to Petition for Special Relief at 3.

8. The *Press* decision is factually distinguishable from the instant case and does not support the relief requested by Texas Telecasting. In *Press*, a station located in Clermont, Florida, sought to have its Section 73.658(m) protection waived so that it would be treated as part of the Orlando-Daytona Beach-Melbourne-Cocoa television market (the "Orlando hyphenated market"). The Clermont station had argued that the marketplace realities in the area undermined the value of its Section 73.658(m) protection, and that it needed to operate on an equal competitive footing with other stations located in the larger hyphenated market in which it was forced to compete. The Clermont station in *Press* was a small-market independent station, licensed to a community located 25 miles away from Orlando. That station shared a transmitter site with a station licensed to Daytona Beach. Clermont was not a market separately recognized, and it had only one television station. Moreover, the rating services and parties selling programming to the Clermont station assumed that it was part of the Orlando hyphenated market and understood their agreements with the Clermont station to provide for exclusivity throughout the Orlando hyphenated market. We concluded that given the common tower site, market structure, and industry treatment, as well as the competitive difficulties faced by the Clermont station, the overall intended purposes of the rules would be best served by allowing the Clermont station to compete for exclusivity within the Orlando hyphenated market. Significantly, in granting the requested waiver in *Press*, we stated:

> We are confronted here with a station in a "smaller market" seeking to compete in the larger Orlando-Daytona Beach-Melbourne-Cocoa market. We are not faced with a large market station seeking to expand exclusivity into smaller fringe markets.... This is not a situation where exclusivity will be extended over stations in smaller markets outside, but within 35 miles, of the named communities in the market. Such a situation could dictate a different result.

Press, 4 FCC at 8801 n.2.

9. Following *Press*, we granted a waiver request to TV 14, Inc., licensee of Station WTLK(TV), Rome, Georgia, allowing it to be treated as part of the Atlanta market for purposes of the Section 73.658(m).[5] As in *Press*, the petitioner in *TV 14, Inc.*, was a small market, independent, UHF station that placed a City Grade signal over Atlanta and a Grade B signal over the majority of counties in the Atlanta television market. The television rating services and program listings included the Rome station in the Atlanta market listings. Rome was not a separately recognized market, and WTLK was its only station. We granted the waiver based on our conclusion that the Rome station was faced with unavoidable competition from Atlanta stations that threatened its survival. We also based our decision on the fact that the Rome station seeking the waiver was the very type of station that was meant to benefit from our territorial exclusivity restrictions.

10. Here, we are faced with a request by a station in a larger market seeking to extend its program exclusivity rights to include a competitor in a smaller market, licensed to a community located 54 miles away. This is the type of situation Section 73.658(m) was designed to prevent. As we have previously indicated, Section 73.658(m) was intended to safeguard such overshadowed stations.

---

[4] Texas Telecasting asserts that it purchased broadcast rights to certain programs believing it had secured exclusivity with respect to those programs within the Beaumont community. Texas Telecasting indicates that KVHP also purchased broadcast rights to these same programs and, by moving its antenna to alter its coverage, has therefore undermined Texas Telecasting's expectation of exclusivity within the latter's community of license. *See* Texas Telecasting's Petition for Special Relief at 4.

[5] *TV 14, Inc.*, 6 FCC Rcd 7234 (1991).

Ralph C. Wilson Industries, Inc., 91 FCC 2d 127, 137-138 (1982). Unlike the Clermont station in *Press*, the overshadowed station here, KVHP, is not requesting a waiver of Section 73.658(m) in order to obtain exclusivity against television stations in the Beaumont-Port Arthur market. On the contrary, KVHP opposes Texas Telecasting's Petition and does not seek to expand its exclusivity rights beyond the Lake Charles market. Moreover, KVHP also faces competition in Lake Charles from overlapping stations outside its own exclusivity zone licensed to Beaumont and Lafayette, Louisiana.[6] Thus, as KVHP indicates, it is not uncommon for there to be two or three stations airing the same syndicated program in Lake Charles.

11. The equitable considerations that justified our decision in *Press* and *TV 14, Inc.* are not present here. In those cases, we concluded that there was an unambiguous factual pattern that demonstrated that the Rule was functioning in conflict with its intended purpose. Specifically, we based our decisions in *Press* and *TV 14, Inc.* on the anomalous way in which the Rule was hindering a fringe market station's ability to compete, and we stated that this anomaly warranted " 'consideration of an application for exemption based on special circumstances.'" *Press*, 4 FCC Rcd at 8801, and *TV 14, Inc.*, 6 FCC Rcd at 7235, *both quoting WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

12. Texas Telecasting's Petition does not involve such "unambiguous" facts or special circumstances. In this case, Section 73.658(m) is functioning as it was intended to, allowing exclusivity among competitors licensed to communities within the Beaumont-Port Arthur 35 mile zone, while protecting Station KVHP's opportunity to obtain syndicated programming. Although it is true that the relocation of KVHP's transmitter site allows it to compete to a greater degree with Beaumont area stations, the nature and extent of that competition, as reflected in the record, is insufficient to justify a waiver of Section 73.658(m).[7] Texas Telecasting has not met its burden of demonstrating that KVHP competes sufficiently in the Beaumont-Port Arthur market for ratings, advertising or programming to warrant a waiver of the rules rescinding the exclusivity rights of the very type of station the exclusivity rules were intended to protect. Nor has Texas Telecasting otherwise shown that KVHP is regarded by the industry as a competitor in the Beaumont-Port Arthur market. Section 73.658(m) contemplates that fringe market stations may have some contour overlap with adjacent markets and, therefore, may compete to some extent with stations located in those markets.[8] Nonetheless, the non-network territorial exclusivity rule was proposed and adopted, in part, to assure that excessive contractual exclusivity would not unreasonably deprive fringe market stations, particularly independent UHF stations, from the opportunity to obtain quality syndicated programming. *Notice of Proposed Rule Making*, in MM Docket No. 18179, 33 Fed. Reg. 7158 (1968); *First Report and Order* in MM Docket No. 18179 42 FCC 2d 175 (1973), *reconsideration granted in part*, 46 FCC 2d 892 (1974).

13. Finally, the relief Texas Telecasting requests would allow it to extend the reach of its exclusivity rights to obtain broadcast exclusivity "against KVHP but not against the other Lake Charles licensee, Station KPLC(TV). As a result, KVHP would be precluded from obtaining broadcast rights to certain programs within the Lake Charles market that its competitor, KPLC, would not be prevented from obtaining. The establishment of such a competitive imbalance among stations within the same market is contrary to the objectives of Section 73.658(m).

CONCLUSION

14. Unlike the unambiguous facts that compelled a waiver of Section 73.658(m) in *Press*, the waivers requested by Texas Telecasting and Freedom-TV are not required to correct an anomaly in the application of Section 73.658(m) of our Rules. Since Section 73.658(m) is functioning as it was intended to, we decline to grant the relief requested.[9]

ORDERING CLAUSE

15. Accordingly, IT IS ORDERED that the "Petition for Special Relief" filed June 12, 1989, by Texas Telecasting, Inc., and the "Comments of Freedom-TV Sub, Inc. and Petition for Special Relief" filed July 27, 1989, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[6] For example, KBMT is carried on the Lake Charles area cable system and its transmitter is located east of Beaumont in the direction of Lake Charles and is, in fact, only twenty miles from KVHP's transmitter site.

[7] The only showing made in these regards is that KVHP has opened a sales office in Beaumont and has filed a petition requesting that it be granted "significant viewing" status in Jefferson County, where Beaumont is located.

[8] Thus, under our Rules, Texas Telecasting had no reasonable expectation of exclusivity vis-a-vis stations outside its Section 73.658(m) territorial exclusivity zone. Section 73.658(m) reflects the Commission's desire to protect program exclusivity rights only against other stations within the same television market or licensed to communities within a 35 mile radius. Section 73.658(m) was not intended to extend exclusivity rights to include a broadcaster licensed to a community on the fringe of a large market whose signal overlaps the larger market. *See Ralph C. Wilson Industries, Inc.*, 91 FCC 2d at 129.

[9] To the extent that the requests in this case raise general issues regarding the merits of geographic restrictions contained in the territorial exclusivity rule, they will be addressed within the pending rule making in Gen. Docket No. 87-24. *See Notice of Inquiry and Proposed Rule Making*, 2 FCC Rcd 2393 (1987); *Further Notice of Proposed Rule Making*, 3 FCC Rcd 6171 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of	
Radio Ohio, Inc.	File Nos. BR-890526UR BRH-890526US
For Renewal of Licenses of Stations WBNS/WBNS-FM Columbus, Ohio	
Salem Media of Ohio, Inc.	File No. BR-890530XI
For Renewal of License of Station WRFD(AM) Columbus, Ohio	
WPTW Radio, Inc.	File Nos. BR-890525VH BRH-890525VI
For Renewal of Licenses of Stations WPTW/WCLR(FM) Piqua, Ohio	

MEMORANDUM OPINION & ORDER

Adopted: September 23, 1992; Released: October 2, 1992

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications from the above-listed radio stations in Ohio; (ii) a timely filed Petition to Deny by the Ohio State Conference of Branches of the National Association for the Advancement of Colored People (NAACP), its various local branches and the National Black Media Coalition (NAACP/NBMC) against the license renewal applications of the above-listed radio stations;[1] (iii) oppositions filed by the licensees; and (iv) the licensees' responses to staff letters of inquiry. NAACP/NBMC allege that the challenged stations violated the Commission's Equal Employment Opportunity (EEO) Rule and policies. Accordingly, they request that the Commission conduct an investigation of the employment practices of stations WBNS/WBNS-FM and WRFD pursuant to *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*) and designate the renewal applications for hearing. Regarding stations WPTW/WCLR(FM), NAACP/NBMC argue that because they are recidivists, these stations' applications should be promptly designated for hearing and denied.

II. BACKGROUND

2. *Standing.* The licensees of Stations WBNS/WBNS-FM and WRFD argue that NAACP and NBMC have failed to establish standing because they did not submit affidavits from listeners of the stations or residents within the stations' service areas. In challenging an application pursuant to Section 309(d)(1) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show. .. that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. Section 309(d)(1). *See also Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Application of Dubuque T.V. Limited Partnership and Sage Broadcasting Corporation of Dubuque, Iowa for Assignment of Television License for KDUB-TV, Dubuque, Iowa*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. Filed with the petition was a declaration under penalty of perjury from the President of the Ohio State Conference of Branches of the NAACP regarding all of the challenged Ohio stations. The Commission has held previously that the statement of a person who does not claim to be a listener of the challenged station or a resident of its service area, does not satisfy the standing requirements of the Act. *See Applications of Certain Broadcast Stations Serving Communities in the States of Michigan and Ohio*, 3 FCC Rcd 6944 (1988); *see also Applications of KDEN Broadcasting Co. for Renewal of License of Station KDEN, Denver, Colorado*, 55 Rad. Reg. 2d (P&F) 1311, 1311-1312 (1984). Because the declaration does not allege that the President is a listener of any of the challenged stations or a resident within the service areas of any of the stations, it is insufficient to establish standing for the organization. In addition, NAACP submitted late-filed declarations from the President of the Columbus Branch of the NAACP regarding stations WBNS/WBNS-FM and WRFD in Columbus, Ohio. NAACP has failed to establish good cause for its late filings and they will not be considered herein. *See Applications of Certain Broadcast Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988). Accordingly, we find that the pleading filed by the NAACP does not constitute a valid petition to deny against WBNS/WBNS-FM and WRFD and, therefore, will be treated as an informal objection in accordance with 47 C.F.R. Section 73.3584(b).

4. Next, we note that the pleading did not include a statement under penalty of perjury regarding stations WPTW/WCLR(FM). Accordingly, we find that the pleading filed by the Ohio State Conference of Branches of the

[1] NAACP/NBMC challenged the renewal applications of 52 radio stations in Michigan and Ohio. This *Order* addresses the renewal applications of only five of those stations. The applications of the remaining stations will be the subject of separate orders.

NAACP does not constitute a valid petition to deny against WPTW/WCLR(FM) and, therefore, will be treated as an informal objection. 47 C.F.R. Section 73.3584(b).

5. Finally, the pleading contained a statement under penalty of perjury from the chairman of NBMC, Pluria W. Marshall, a resident of the Washington, D.C. area. However, as noted above, the Commission has held previously that the statement of a person who does not claim to be a listener of the challenged station or a resident of its service area does not satisfy the standing requirements of the Act. *See Michigan/Ohio, supra.* Accordingly, we hold that NBMC lacks standing to petition against the above-listed radio stations and we will treat its pleading as an informal objection pursuant to 47 C.F.R. Section 73.3584(b).

III. PLEADINGS

6. NAACP/NBMC derived their factual allegations from the licensees' EEO programs and annual employment reports. Review of the licensees' EEO records led us initially to conclude that NAACP/NBMC presented a *prima facie* case demonstrating that unconditional grant of the renewal applications would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act, 47 U.S.C. Section 309(d)(1); *Astroline, supra.*[2] Further inquiry was therefore necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

7. However, subsequent review of NAACP/NBMC's EEO allegations as well as each licensee's renewal application, opposition and inquiry responses leads us to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence that the licensee engaged in discrimination. Thus, grant of each application will serve the public interest. 47 U.S.C. Section 309(d)(2). *Astroline, supra.* Accordingly, we will grant renewal, but with appropriate remedies.

IV. DISCUSSION

8. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ, and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ, and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080(b), 73.2080(c).

9. When a renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of remedies or sanctions, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967, (1987), *petition for reconsideration pending; see also* 4 FCC 1715 (1989) (request for clarification by National Association of Broadcasters). *See e.g., Beaumont, supra; Bilingual, supra.*

WBNS/WBNS-FM, Columbus

10. The stations' 1989 EEO Program Report, opposition and inquiry responses indicate that during the period June 1, 1986, to August 31, 1989, the licensee had 20 full-time hiring opportunities, including 19 for upper-level positions. The licensee received minority referrals from Columbus Para Professional Institute (one) and clients (one). In addition, it states that it received three minority referrals from either *Columbus Dispatch* or *Call & Post*. Other recruitment sources contacted for 13 vacancies, but producing no minority referrals, included: 10 religious institutions, four educational institutions, 16 community organizations, and one employment agency. The licensee provided interview pool information for 16 positions. For these positions, the licensee interviewed 23 minorities for 11 full-time positions, including 21 minorities for 10 upper-level positions. Three Blacks were hired for upper-level positions.[3]

11. NAACP/NBMC question the extent to which the licensee recruited for minorities. First NAACP/NBMC assert that the licensee's 1989 EEO Program Report lists only three minority organizations and the *Call & Post*. Second, they note that no referrals were identified as being generated from any of these sources.

12. In opposition, the licensee states that it is committed to attracting, hiring and promoting qualified minorities. The stations' general manager states that a list of 30 minority and female organizations was developed during the license term and continuously refined to identify those which were most effective. He asserts that since 1987, whenever a vacancy occurred, "separate letters were usually sent to every one of the minority and other organizations on its list, including NAACP, informing them of the

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[2] As is our practice in all cases, we reviewed the licensees' EEO efforts toward both women and minorities. We find each licensee's record of recruiting women sufficient.

[3] The Columbus, Ohio MSA, in which the stations are located, includes a 11.0% minority labor force (9.7% Blacks, 0.6% Hispanics, 0.5% Asian/Pacific Islander, 0.1% American Indian). The 1989 Annual Employment Report listed three Blacks (8.6%) among 35 full-time employees overall and two Blacks (6.5%) among 31 upper-level job employees. In the 1988 report, two Blacks (6.1%) were listed among 33 full-time employees overall and one Black (3.6%) was listed among 28 upper-level job employees. The 1987 report listed two Blacks (5.9%) among 34 full-time employees overall and one Black (3.4%) was listed among 29 upper-level employees. In the 1986 and 1985 reports, one Black (2.9%) was listed among 35 full-time employees overall and no minorities were listed among 30 and 32 upper-level job employees, respectively. The 1984 report listed two Blacks (5.1%) among 39 full-time employees overall and one Black (3.0%) among 33 upper-level job employees. In the 1983 report, three Blacks (7.7%) were listed among 39 full-time employees overall and two Blacks (5.9%) were listed among 34 upper-level employees.

opening and asking for referrals."[4] Further, an "EEO Data Form" was used to collect information about all applicants for each job opening. Although these efforts have resulted in increased minority hires, the licensee indicates that many minority employees left the stations during the term.[5]

13. Upon analysis of the licensee's opposition and inquiry responses, we conclude that no substantial and material questions of fact remain to be resolved. *Astroline, supra.* Because it attracted and hired minorities for full-time positions, we find no evidence that the licensee engaged in discrimination. Accordingly, designation for hearing is not warranted. Further, we find no evidence that the licensee's EEO program and efforts warrant imposition of any remedies or sanctions. *See* paragraphs 10 and 12 and note 5, *supra.*

14. However, minorities appeared in only 11 of 20 interview pools, including 10 of 19 interview pools for upper-level positions. We urge the licensee to make stronger efforts to include minorities in every interview pool and to contact recruitment sources for every vacancy.

WRFD, Columbus

15. The station's 1989 EEO Program Report, opposition and inquiry response reveal that during the period June 1, 1986, to June 1, 1989, there were 20 full-time vacancies, including 16 for upper-level hiring opportunities. The licensee received minority referrals from Continental Employment Service (one), NAACP (one), the Urban League (five) and a Black member of the Columbus City Council (one). Other sources generally contacted for nine of the 20 vacancies include: NOW, Mt. Olivet Baptist Church, Shiloh Baptist Church, Oakley Baptist Church, Rehobeth Temple, *Call & Post,* Cedarville College, Ohio State University, JYC Communications, on-air advertisements and employees.[6] For two sales positions, the only recruitment contact was a Black member of the Columbus City Council. There were no affirmative recruitment efforts for the remaining nine vacancies. Seven minorities were interviewed for six vacancies, including three minorities for four upper-level positions. During the three year period under review, the licensee hired two Blacks for clerical positions and one Black for a sales position.[7] In addition, during the period June 1, 1989, to September 18, 1989, a Black was hired for a sales position.

16. NAACP/NBMC argue that the station's weak statistical record, by itself, raises a question concerning the adequacy of the EEO efforts. The licensee states that it intensified its EEO efforts over the license term by establishing an internship program and a sales training program to encourage the advancement of minorities in broadcasting. The licensee notes that in 1986 and 1989, it met or exceeded the Commission's 50% of parity guidelines both overall and in upper-level categories.

17. Upon analysis of the licensee's EEO record, we find that there are no substantial and material questions of fact remaining to be resolved. Because the licensee attracted and hired minorities for full-time vacancies, we find no evidence that the licensee engaged in discrimination. Accordingly, designation for hearing is unwarranted. *Astroline, supra.* We do find, however, that the licensee's efforts were inadequate. We will, therefore, grant renewal subject to reporting conditions.

18. Our review indicates that, although the licensee contacted several minority organizations and modified its recruitment list, it did not consistently engage in adequate recruitment efforts for its upper-level positions. We note that the licensee did not affirmatively recruit for nine upper-level vacancies. Moreover, two other upper-level positions were filled prior to the completion of the "EEO recruitment process." Specifically, the licensee hired a white female for a commercial copywriter position "contingent upon the station completing its EEO recruitment efforts." In another case, the licensee made follow-up calls to recruitment sources regarding a sales position three days after the position was filled.

19. We find this case similar to WFBR, *The Baltimore Radio Show, Inc.*, 3 FCC Rcd 5913 (1988), in which we imposed reporting conditions. The licensee of WFBR, like the licensee here, engaged in sporadic efforts to recruit minorities and did not affirmatively recruit for seven of 15 vacancies. In addition, the licensee did not adequately self-assess its recruitment program.

20. Similarly, the licensee of WRFD did not affirmatively recruit for nine of its 20 vacancies. Further, the licensee here did not adequately assess its program despite its failure to attract minorities for most of its interview pools, particularly those for upper-level positions. In addition, the licensee did not maintain adequate records for self-assessment as it could provide the total number of interviewees for only 11 positions. Finally, we are troubled by the licensee's previous action of making two hiring decisions prior to the completion of EEO recruitment efforts. Accordingly, to ensure that the licensee engages in consistent recruitment efforts for all vacancies, we will impose reporting conditions.

WPTW/WCLR(FM), Piqua

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[4] The Manager explains that a few positions were filled without contacting the organizations on the list, because the licensee was able to draw on its file of applicants for previous positions, or existing staff.

[5] The licensee states that seven of the nine minority employees hired during the license term voluntarily resigned or were terminated. We also note that 62 white employees were among the 69 employees who voluntarily resigned or were terminated.

[6] In addition to some of the above-listed sources, the licensee contacted the following sources for one of the nine positions: Word of Life; Church of Living Word; Christ, the King of Lutheran Church; Grace Brethren Church; and Christian Amory. In its renewal application, the licensee also lists minority referrals from Mt. Olivet Baptist Church (one), employees (one) and on-air ads (three).

[7] The Columbus, Ohio MSA, in which the stations are located, includes a 11.0% minority labor force (9.7% Blacks, 0.6% Hispanics, 0.5% Asian/Pacific Islander, 0.1% American Indian). The 1989 Annual Employment Report listed one Black (7.1%) among 14 full-time employees overall and no minorities among 12 upper-level job employees. The 1988 and 1987 reports listed no minorities among 13 and 12 full-time employees, respectively. The 1986 report listed one Black (8.3%) among 12 full-time employees overall and one Black (10.0%) among 10 upper-level job employees. The 1985 and 1984 reports listed no minorities among 10 full-time employees overall.

21. By way of background, the Commission imposed reporting conditions for three years on WPTW/WCLR(FM) in 1983 because of the licensee's deficient EEO program during the preceding license term, in which the licensee employed no minorities. *See Richey Airwaves, Inc.*, 53 R.R. 2d 331, 336, 337 (1983) (*Richey*), *aff'd. on recon*, FCC 84-297 (released July 2, 1984). In 1986, the three year reporting period ended and in a staff letter dated September 12, 1986, the Commission cautioned the licensee to continue reasonable and good faith efforts to recruit qualified Blacks as full-time vacancies occurred.

22. Our review of the licensee's 1989 EEO Program Report, opposition and inquiry response indicates that there were seven full-time vacancies, including four for upper-level jobs, during the period May 15, 1986, to May 15, 1989.[8] The licensee states that it received minority referrals from the following recruitment sources: International School of Broadcasting (six), Dayton Urban League (one), other broadcast stations (three) and American Women in Radio & Television (one). Other recruitment sources contacted for the seven vacancies include: three government agencies, nine educational institutions, three professional associations, other businesses, the Troy Employment Office, Lancelot Studio of Advertising and United Fund. The licensee interviewed 16 minorities among 84 applicants for the seven full-time positions overall, including eight minorities among 52 applicants for the four upper-level positions, but did not hire any.[9] Because the stations are located some 30 miles from Dayton, the licensee continues to assert that it is difficult to attract "qualified" minority applicants. The licensee believes that its recent affiliation with a Dayton television station and involvement with a Dayton marketing firm may encourage more Dayton area applications.

23. NAACP/NBMC note, however, that from 1975 to 1989, the stations did not report any minorities on its full- or part-time staff. They argue that the real reason for the recruitment difficulties is because of few recruitment efforts aimed at minorities. In this regard, they note that the licensee's 1989 EEO Program Report listed only one minority recruitment source. Further, NAACP/NBMC argue that the licensee has forgotten the Commission's admonishment in 1985 to contact minority organizations each time a vacancy occurs.

24. In its opposition, the licensee responds that NAACP/NBMC's charge that it is resisting equal employment opportunity is contrary to the facts. It notes that it has actively recruited minority applicants, but that few minorities reside in the Piqua area and few minorities from Dayton and other areas with significant minority populations are willing to travel the considerable distance to Piqua. Nonetheless, the licensee argues that it has "actively solicited applicants from sources which have many minority job seekers whenever a vacancy occurs," by periodically sending letters to educational institutions and other sources, specifically requesting minority and female applicants.[10] In addition, it states that it employed a Black male in a full-time upper-level position in 1989, the last year of the license term.

25. Upon analysis of the licensee's EEO record as well as the arguments raised by NAACP/NBMC, we find that there are no substantial and material questions of fact warranting designation for a hearing. *Astroline, supra*. We note that, although the licensee did not hire minorities during the time it was not subject to reporting conditions, its efforts attracted several minority applicants. We, therefore, find no evidence that the licensee engages in discrimination.

26. We find that the licensee engaged in efforts to attract minority applicants. The licensee contacted a number of recruitment sources for its full-time vacancies, received 11 minority referrals during the reporting year and attracted 16 minority applicants for its seven full-time vacancies, including eight minorities for four upper-level positions during the three year period under review. However, we are concerned that although the stations were previously under reporting conditions from 1983 to 1986, its efforts resulted in no minority full-time hires within the most recent three year period, and only one minority hire, an American Indian, during the three years the stations were under reporting conditions.

27. The licensee relies on its distance from Dayton to explain why it can not attract "qualified" minority applicants. We note, however, that a similar argument was made by the licensee and rejected by the Commission during its original review of the licensee's 1983 EEO Program and on reconsideration. *See Richey, supra; WPTW, supra*. In *WPTW*, the licensee argued that it could not attract minorities because it was located in a county with a two per cent minority labor force and was located a considerable distance from Dayton which has a substantially greater minority labor force. The Commission found that because applicants were being referred from Dayton recruitment sources, including a minority hired during the

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[8] The licensee had a copywriter's position which was filled on September 22, 1986. As a result of employee turnover, the position subsequently became vacant and was again filled on November 17, 1986 and December 22, 1986. The licensee filled the September vacancy by promoting a part-time employee. For the November and December positions, the licensee relied on an applicant pool apparently developed as a result of its recruitment efforts conducted for the September position.

[9] The Black employee reported on the 1989 Annual Employment Report reflected not a hire, but the upgrade to full-time status of a part-time employee who originally participated in the stations' trainee program. The Dayton-Springfield, OH MSA, in which the stations are located, has a 12.2% minority labor force (11.0% Blacks, 0.6% Hispanics, 0.5% Asian/Pacific Islander, 0.1% American Indian). The 1989 Annual Employment Report listed one Black (7.7%) among 13 full-time employees overall and one Black (9.1%) among 11 upper-level employees. The 1988, 1987, 1986 and 1985 reports listed no minorities among the 12 full-time employees. Neither the 1984 or 1983 report listed minorities among 13 and 14 full-time employees, respectively. The licensee did hire one minority, an American Indian, for a lower-level position in 1984. However, this employee did not remain with the stations long enough to appear on any annual employment report.

[10] In addition to the sources listed above, the licensee states that it sends letters generally requesting minorities, but without listing specific vacancies to the following sources: Miami Housing Authority in Dayton; American Friends Service Committee in Dayton; Department of Human Services in Dayton; Ohio Chapter of NOW; National Council for Negro Women, Inc., National Council for Career Women, both in Washington, D.C.; and Central State Univ. and Wilberforce Univ., two predominantly Black universities in Ohio.

stations' first EEO progress reporting period, there was no evidence suggesting that Piqua stations could not reasonably be expected to draw minority applicants from the Dayton/Springfield, Ohio MSA. *See WPTW, supra.* We see no reason to disturb this finding here. As we found in 1984, minorities are being referred by Dayton recruitment sources, including the minority employee who was promoted to a full-time upper-level position in 1989. Further, of the 16 minority applicants for full-time vacancies during the three year period under review, only one is listed as expressing a reluctance to travel to Piqua. In addition, the licensee has not shown that it has engaged in sufficient recruitment efforts using Dayton area sources which could yield more qualified minority applicants for specific vacancies. As noted previously, the licensee listed a number of recruitment sources, including minority organizations and colleges in Dayton and other areas in Ohio, which apparently were not contacted for specific vacancies. In light of these facts, we find that the licensee has not shown that it is unreasonable to continue to expect it to draw qualified minority applicants to its stations from Dayton and, therefore, its argument on this issue lacks merit. *See WPTW, supra; see also National Capital Christian Broadcasting Inc., for Renewal of License of Station WTKK(TV), Manassas, Virginia,* 3 FCC Rcd 1919 (1988). Considering all of the above, particularly its small number of hiring opportunities, we believe that the licensee's EEO program should be monitored through reporting conditions for the remainder of the license term. *See Application of Tulsa 23 For Renewal of License of Station KOKI-TV, Tulsa, Oklahoma,* 4 FCC Rcd 2067 (1989). In this regard, while the licensee recruited for the seven full-time vacancies over a three year period and received a significant number of minority applicants (16), it is not apparent from the licensee's records why the review of these minority applications failed to result in any minority hires. Given this licensee's past history, we caution it that our review of the future annual EEO reports required herein will closely monitor the extent to which recruitment results in a meaningful pool of qualified minority applicants, and whether any such applicants are actually hired. In addition, we note that if the facts herein had indicated a significantly larger number of hires over several years, much stronger sanctions would have been imposed.

V. CONCLUSION

28. After reviewing the evidence and arguments submitted by NAACP/NBMC and all licensees in the instant case, we find no hearings are warranted and the records of the licensees support the granting of all of their renewal applications. With respect to WBNS/WBNS-FM, unconditional grant of their renewal applications is warranted. Because of concerns about future affirmative action efforts, however, reporting conditions are warranted for WRFD and WPTW/WCLR(FM), as specified below.

VI. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED, that the petition to deny filed by the NAACP and NBMC IS DISMISSED, and when considered as an informal objection IS DENIED.

30. IT IS FURTHER ORDERED, that the renewal applications filed by Radio Ohio, Inc. for Stations WBNS/WBNS-FM ARE GRANTED.

31. IT IS FURTHER ORDERED, that the renewal applications filed by Salem Media of Ohio, Inc. for Station WRFD and WPTW Radio, Inc. for Stations WPTW/WCLR(FM) ARE GRANTED subject to the reporting conditions described herein.

32. IT IS FURTHER ORDERED, that the licensee of WRFD(AM) submit to the Commission an original and one copy of the following information on June 1, 1993, June 1, 1994 and June 1, 1995, and that the licensee of WPTW/WCLR(FM) submit an original and one copy of the following information on June 1, 1993, June 1, 1994, June 1, 1995 and June 1, 1996:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title, 395-B job classification and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. This list should also note which recruitment sources were contacted;[11]

(b) A list of employees as of the May 1st payroll period for each annual report by job title, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex, and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

33. The reports are to filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action or require further information concerning the employment reports, they may telephone the Mass Media Bureau's EEO Branch, (202) 632-7069.

34. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order to all parties.

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[11] Such a list might start:

(1) News Director; Officials and Managers; Full-time

3 Applicants:	1 white female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP

Selected: Black male (03/15/92)

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 24, 1992

Released: October 2, 1992

CERTIFIED MAIL NO. P 897 383 281
RETURN RECEIPT REQUESTED

Surrey Front Range LTD Partnership
Suite 570
165 S. Union Blvd.
Lakewood, CO 80228

Re: Notice of Apparent Liability issued to Surrey Front Range LTD Partnership, licensee of station KATM-FM, on January 8, 1992, 3153402-92023

Dear Surrey Front Range LTD Partnership:

This is in response to your letter of March 17, 1992, to the Secretary, Federal Communications Commission (FCC), Washington, D.C. Your letter requested review by the Commission of a $7,500 monetary forfeiture penalty issued by the FCC's Denver Office to Surrey Front Range LTD Partnership (Surrey), licensee of broadcast station KATM-FM.

The purpose of this letter, as explained in detail below, is to amend the Notice of Apparent Liability that was issued to Surrey, to mitigate the proposed monetary forfeiture penalty to $6,000, to deny review by the Commission at this time, and to respond to Surrey's arguments.

Our records show that on December 6, 1991, an FCC inspector visited broadcast station KATM-FM, Pueblo, Colorado. During his review of the KATM's local public inspection file, the inspector could not find the most recent ownership report; the most recent annual employment report; requests for broadcast time by political candidates; and certain issues-program lists for 1990 and 1991.

On January 8, 1992, the FCC's Denver Office issued a Notice of Apparent Liability to Surrey for a $7,500 monetary forfeiture penalty for "repeated" violations of Section 73.3526(a) of the FCC's rules, 47 C.F.R. Section 73.3526(a) (requires FM stations to maintain the above records in a file available for public inspection). Surrey responded on February 18, 1992. On February 19, 1992, the FCC's Denver Office issued a Notice of Forfeiture to Surrey for a $7,500 monetary forfeiture penalty.

The Notice of Forfeiture issued to Surrey on February 19, 1992, is rescinded. The Notice of Apparent Liability issued to Surrey on January 8, 1992, is amended in the following respects. The proposed monetary forfeiture penalty is reduced from $7,500 to $6,000 based on the "Downward Adjustment Criteria" contained in the FCC's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695, 69 RR2d 823 (1991), *modified on reconsideration*, FCC 92-212 (May 14, 1992) (hereinafter cited as *Policy Statement*). Instead of charging repeated violation of the FCC's rules, a willful violation is charged. There was a willful violation because the "omission of required forms... implies the type of indifference to Commission Rules that justifies the imposition of forfeitures...[C]lerical errors in failing to file required forms" are subject to forfeiture penalties. *Standard Communications Corporation*, 1 FCC Rcd 358 (1986). The reference in the Notice of Apparent Liability to missing issues-programs lists for 1988 and 1989 is deleted. However, Surrey is still charged with not having in its local public inspection file issues-programs lists for the second, third and fourth quarters of 1990 and the first, second and third quarters of 1991. These amendments to the Notice of Apparent Liability are made within the time frame provided in Section 503(b)(6) of the Communications Act of 1934, 47 U.S.C. Section 503(b)(6).

Furthermore, Surrey states that it has an "inability to pay the forfeitures.... particularly in light of the distressed economic environment presently existing in the radio industry..." The Communications Act of 1934 directs the FCC to consider ability to pay when imposing monetary forfeiture penalties. 47 U.S.C. Section 503(b)(2). If there is a serious problem in paying the forfeiture penalty, the FCC needs supporting documentation. This documentation usually takes the form of income tax returns. Therefore, if you wish to claim inability to pay, please provide the FCC with copies of Surrey's Federal Income Tax returns or other documentation for the last three years.

In accordance with Section 503(b)(4) of the Communications Act of 1934, you are granted an opportunity to explain, in writing, why the proposed $6,000 monetary forfeiture penalty should be reduced or not imposed. If you wish to submit additional comments in response to the amended Notice of Apparent Liability and/or documentation regarding inability to pay, please submit this information within 30 days of the receipt of this letter. We will carefully review information that you may provide before making a final determination. If you do not wish to provide additional information, please pay the $6,000 monetary forfeiture penalty within 30 days of the receipt of this letter. Monetary forfeitures may be paid by check or money order payable to the Federal Communications Commission. The number 3153402-92023 should be placed on the check. The forfeiture payment should be sent to:

Federal Communications Commission
PO Box 73482
Chicago, Illinois 60673-7482

If you wish to submit additional information in response to the amended Notice of Apparent Liability or documentation regarding inability to pay, please send this information within 30 days to:

Federal Communications Commission
Enforcement Division, Higher Level Review
Field Operations Bureau
1919 M St., NW Room 744
Washington, DC 20554

If you do not provide additional information, the $6,000 monetary forfeiture penalty must be paid within 30 days of the receipt of this letter. If the forfeiture is not paid within

this period, the forfeiture case may be referred to the U.S. Attorney for collection through a civil suit. 47 U.S.C. Section 504(a).

Surrey claims that its February 18, 1992, letter to the FCC's Denver Office in response to the Notice of Apparent Liability was a request for reconsideration, and that its March 17, 1992 letter, should be considered an Application for Review by the Commission under Section 1.115 of the FCC's rules. 47 C.F.R. Section 1.115. We disagree. Section 1.106 of the FCC's rules indicates that reconsideration is only appropriate when there is a final FCC action. 47 C.F.R. Section 1.106. A Notice of Apparent Liability is not a final FCC action, and therefore, reconsideration is not available at this stage of a forfeiture proceeding. Only after a Notice of Forfeiture has been issued, which actually imposes a penalty, has there been a final FCC action which may be subject to reconsideration. 47 C.F.R. Section 1.80(f) and (i). Furthermore, Surrey's February 18 letter indicated it was a response to the FCC's Notice of Apparent Liability, which requested a response as authorized by Section 1.80 (f) of the FCC's forfeiture rules, and Surrey's letter did not clearly request "reconsideration" which is covered by a different FCC rule, namely, Section 1.106. 47 C.F.R. Section 1.106.

Since the Notice of Apparent Liability is amended by this letter, review by the Commission, as requested by Surrey in its March 17 letter, is not appropriate at this time. There has been no final action regarding the forfeiture and the Field Operations Bureau has not been given the opportunity to consider all the issues raised by Surrey in its most recent letter. 47 C.F.R. Section 1.115. This, of course, does not preclude Surrey from seeking reconsideration and review once these requirements are met.

In its correspondence to the FCC, Surrey raises a number of objections to the proposed monetary forfeiture penalty. The remainder of this letter clarifies the issues that have been raised.

Surrey states that the FCC failed to consider the downward adjustment criteria specified in the FCC's *Policy Statement* on monetary forfeiture penalties, and if the FCC considered the factors presented by Surrey, the penalty would be greatly reduced or eliminated. As discussed above, the monetary forfeiture penalty of $7,500 that the FCC's Denver Office proposed to impose on Surrey, which the *Policy Statement* lists as the "base amount" for a violation of the public file rules, is reduced to $6,000 based on the downward adjustment criteria.

Surrey claims, as part of its argument that the FCC did not take into account its "downward adjustment criteria", that the penalty should be reduced because the violations were minor. It is not necessarily a minor violation when nine documents in four of the nine categories of documents required to be in the local public inspection file are missing. 47 C.F.R. Section 73.3526. Surrey also claims that the violations were "unintentional". However, although the *Policy Statement* provides that an "intentional violation" is an upward adjustment criterion, the *Policy Statement* does not reflect that the converse, namely, an unintentional violation, is a downward adjustment criterion. Surrey further explains that the violations have been corrected. Corrective action likewise is not a downward adjustment criterion. Remedial action, although commendable, does not nullify a forfeiture penalty. *E.g., Station KGVL, Inc.*, 42 FCC2d 258, 259 (1973); *Executive Broadcasting Corp.*; 3 FCC 2d 699, 700 (1966). Surrey lists as additional reasons for reduction of the penalty that it did not economically benefit from the violations and that the public was not harmed. Again, these are "upward" not "downward" adjustment criteria.

However, a history of overall compliance with the FCC's rules is a downward adjustment criterion as correctly indicated by Surrey. The lack of evidence regarding past noncompliance with the FCC's rules is being taken into consideration in reducing the penalty. Surrey also correctly indicated that inability to pay is a downward adjustment criterion. However, as previously discussed, the FCC needs supporting documentation, which usually consists of tax returns, to consider this claim.

Furthermore, Surrey is accurate that voluntary disclosure is a downward adjustment criterion. Surrey somewhat broadly states that "the station's staff voluntarily disclosed to the inspector information regarding the operation." It is anticipated that a station will respond to an FCC inspector's questions and requests for documents that are within the proper scope of an FCC inspection and will, in general, cooperate during an inspection. The FCC's rules, for example, require station records and logs to "be made available to any representative of the FCC upon request." 47 C.F.R. Sections 73.1225 and 73.1226. The public inspection file and its contents are considered "records". *E.g.*, 47 C.F.R. Section 73.3526(a), (d) and (e). Since stations are required to cooperate with an FCC initiated inspection, it is anticipated that a downward adjustment of a penalty for voluntary disclosure during an FCC initiated inspection will be rare. A situation where the downward adjustment criterion of voluntary disclosure may be applied involves a station initiating contact with the FCC regarding a problem, and the FCC subsequently determining that there are rule violations.

With regard to the violations of Section 73.3526(a) of the FCC's rules, Surrey presents several arguments in its defense. 47 C.F.R. Section 73.3526(a) (requires FM stations to maintain a local public inspection file and specifies the documents required to be in the file). First, Surrey states "The [FCC] letter indicates that the complete public inspection file was not made available upon request during routine business hours. This suggests the inspector encountered some difficulty in gaining access to the inspection file which is an egregious misrepresentation or insinuation of such." Surrey has misunderstood the language in the Notice of Apparent Liability issued to it on January 8, 1992. As indicated by Surrey, the Notice stated that the *complete* file was not made available and then lists four types of documents that were missing. There is no indication in the Notice that the FCC inspector had problems in obtaining the public inspection file. This was provided, but it was not complete because of the missing documents. There is no need to amend the Notice of Apparent Liability regarding this issue. The Notice was clear concerning the nature of the violation.

Second, Surrey objects to the charge in the FCC's Notice of Apparent Liability that "the most recent Ownership Report" was missing from the public inspection file. Surrey states that "what was missing was the ownership certification filed with the Commission dated April 5, 1991. The actual Ownership Report [dated February 1, 1990], the document the general public would probably be most interested in, was indeed in the public file. The certification was available in the station. It had simply not been filed."

Section 73.3615 (a) of the FCC's rules requires that an ownership report or a certification that there has been no change in ownership since the last ownership report be filed once a year. 47 C.F.R. Section 73.3615(a). Furthermore, a copy of ownership reports and "related material filed pursuant to this section" are required to be kept in the public inspection file. 47 C.F.R. Section 73.3615(g). The FCC inspector looked in Surrey's public inspection file for an ownership report (FCC Form 323) or a statement certifying that there had been no ownership changes that had been submitted within the last year, and could not find it. The FCC inspector then asked the station's program director to locate this document and he also could not find it.

Section 73.1226 of the FCC's rules requires station records and logs to "be made available to any authorized representative of the FCC upon request." 47 C.F.R. Section 73.1226. *See also* 47 C.F.R. Section 73.1225. The public inspection file in general and its contents, including ownership reports, are considered "records". *E.g.*, 47 C.F.R. Section 73.3526 (a), (d) and (e). These provisions have been interpreted to mean that a broadcast station must have the public inspection file "available for immediate inspection." *Thomas P. Brunnock, Esq.* 50 RR2d 1313, 1314a (1982). Thus, if a requested record cannot be identified and produced during an FCC inspection, the FCC must assume that the record does not exist.

Third, Surrey appears to categorically deny that it violated the public inspection file rule by not having requests for broadcast time by political candidates during the last two years in the file. Surrey argues in its March 17, 1992, request for review by the Commission that "in the previous two year political periods, there were no requests for political time. An item cannot be missing if it never existed in the first place." Likewise, Surrey states in its February 18, 1992, letter to the FCC's Denver Office that "at the time of the inspection, there were no such documents in existence. There had been no such requests by political candidates to purchase time...".

However, as explained in the FCC's February 19, 1992, letter to Surrey, the program director for the station determined during the FCC's inspection "that some requests were made and time aired. He indicated that these political spots were still in a billing status. These requests were nearly two months old and should have been in the Public File."

Surrey claims in its March 17, 1992, letter that this FCC statement "did not address the original charge but merely created a new violation, one not totally relevant to the original charge." This is completely wrong. The statement in the FCC's February 19 letter, in response to Surrey's denial, clearly explained the details of the violation that was charged in the FCC's January 8 letter.

Surrey seems to further object that the FCC's February 19 letter indicated that more than one request for a political spot had been recently made. Surrey states the following:

> We respectfully submit the breadth and scope of a violation taking place over a two year period, which further insinuates repeated violations involving a single act or failure to act, to be considerably greater in magnitude than an arguable violation relating to a single political request, not "requests", still in the billing process, and only one and one-half months old.

Surrey's sentence appears to admit that there had been one request for a political spot, and then argues that this request was not nearly two months old (as stated in the FCC's February 19, 1992, letter), but instead was only "one and one-half months old." This sentence occurs in the same paragraph and shortly after Surrey's statement that "in the previous two year political periods, there were no requests for political time."

Section 73.3526(a)(4) of the FCC's rules requires a public inspection file to contain "records... required to be kept by Section 73.1940 concerning broadcasts by candidates for public office." 47 C.F.R. Section 73.3526(a)(4). Section 73.1940(d) directs licensees to maintain a political file containing a complete record of all requests for broadcast time by candidates for public office with notations indicating the disposition made by licensees of these requests. Section 73.1940(d) further requires licensees to place these records in the political file as soon as possible. The maintenance of an accurate political file is an essential element of Section 315 of the Communications Act of 1934 which relates to broadcasts by political candidates. 47 U.S.C. Section 315. In general, a licensee has no obligation to notify opposing candidates when a candidate uses a licensee's station for a political broadcast, and opposing candidates have only one week to review the political file and to request an "equal opportunity." 47 C.F.R. Section 73.1940(e). *See, e.g., Cincinnati TV 64 LTD.*, 70 RR2d 204, 205 (1991). It is, therefore, very important that licensees file requests for broadcast time by candidates as soon as possible.

Based on Surrey's sentence quoted above and what the program director told the FCC inspector during the inspection, Surrey will continue to be charged, as stated in the FCC's January 8 letter, with a violation of the FCC's public inspection file rule because the file failed to contain "the previous two years of requests for broadcast time by political candidates."

Concerning the failure to have in the public inspection file the most recent Annual Employment Report and the specified Issues-Program Lists, Surrey admits these violations in its February 18, 1992, letter, and presents no further statements regarding these violations in its March 17, 1992, letter.

The Notice of Apparent Liability, therefore, is amended as previously explained in this letter, and the monetary forfeiture penalty is reduced from $7,500 to $6,000. As detailed above, Surrey is allowed 30 days to respond to the amended Notice of Apparent Liability and/or to submit documentation regarding inability to pay. If Surrey does not wish to respond or claim inability to pay, Surrey is required to pay the $6,000 monetary forfeiture penalty within 30 days.

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AFFORD-A-CALL CORP.,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY, File No. E-92-57
THE OHIO BELL TELEPHONE COMPANY, File No. E-92-58
Defendants.

ORDER

Adopted: September 9, 1992; Released: October 2, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On April 16, 1992, Afford-A-Call Corp. (hereinafter "AAC") filed the above-captioned formal complaints against Michigan Bell Telephone Company and The Ohio Bell Telephone Company, alleging, among other things, that AAC had been charged the higher terminating carrier common line ("CCL") charges at both ends of AAC's long distance telephone calls, in violation of Section 69.105 of the Commission's Rules, 47 C.F.R. § 69.105. On September 2, 1992, however, AAC filed a motion to dismiss the complaint with prejudice, stating that the parties had resolved all disputes with respect to the matters encompassed in the complaint.

2. We are satisfied that withdrawal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditures of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss Complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff	Transmittal No. 61
F.C.C. No. 29	

ORDER

Adopted: September 23, 1992; Released: September 23, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On September 10, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective September 24, 1992, on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 29 for Software Defined Network (SDN) Service, Accunet Spectrum of Digital Services, Inter Office Channels, Accunet T1.5 Service, Dataphone Digital Service, and Local Channel Services.

2. On September 17, 1992, Sprint Communications Company LP (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 61.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 29, Contract Tariff Transmittal No. 61 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 29, Contract Tariff Transmittal No. 61, filed by Sprint Communications Company LP IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff	Transmittal No. 60
F.C.C. No. 26	

ORDER

Adopted: September 23, 1992; Released: September 23, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On September 10, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective September 24, 1992, on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 26 for AT&T Accunet Spectrum of Digital Services, Inter Office Channels, Accunet T1.5 Service, Dataphone Digital Service, and Local Channel Services.

2. On September 17, 1992, Sprint Communications Company LP (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 60.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 26, Contract Tariff Transmittal No. 60 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 60, Contract Tariff Transmittal No. 60, filed by Sprint Communications Company LP IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-218

In the Matter of

Amendment of Section 73.202(b),	RM-8053
Table of Allotments,	RM-8054
FM Broadcast Stations.	
(Olathe and Topeka,	
Kansas)	

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: September 3, 1992; Released: October 2, 1992

Comment Date: November 23, 1992
Reply Comment Date: December 8, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration are two separately filed and mutually exclusive petitions for rule making. The first proposal, filed by Bott Broadcasting Company ("Bott"), requests the substitution of Channel 222C3 for Channel 222A at Olathe, Kansas, and modification of the construction permit for Station KCCV-FM (formerly Station KVUQ(FM)) to specify operation on Channel 222C3.[1] To accommodate the upgrade at Olathe, Bott also requests the substitution of Channel 257A for Channel 223A at Topeka, Kansas (RM-8053). The second proposal, filed by Margaret Escriva ("Escriva"), requests the substitution of Channel 223C3 for Channel 223A at Topeka, Kansas, and modification of her construction permit accordingly (BPH-871124MG)(RM-8054).

2. In support of its request, Bott states that substitution of Channel 222C3 for Channel 222A would significantly increase Station KCCV-FM's coverage, bringing additional service to the area. The upgrade would allow for the maximum and most efficient use of Channel 222. Bott filed a supplement to its petition explaining that it had recently been advised that a construction permit was granted for Channel 223A at Topeka. Bott states that it will reimburse the permittee of Channel 223A for all reasonable expenses in changing channels. It further states that it served the permittee with a copy of the supplemental comments.

3. The petition filed by Escriva proposes the substitution of Channel 223C3 for Channel 223A at Topeka, Kansas, and modification of the construction permit for Channel 223A accordingly.[2] Escriva states that modification of the authorization to specify the higher class channel would provide additional reception service for Topeka.

4. We believe both proposals warrant consideration. Channel 222C3 can be allotted to Olathe, Kansas, in compliance with the Commission's spacing requirements.[3] To accommodate the upgrade at Olathe, we shall propose the substitution of Channel 257A for Channel 223A at Topeka, Kansas, and modification of the construction permit for Channel 223A to specify operation on Channel 257A.[4] Channel 222C3 at Olathe is short spaced to Channel 222A, Station KDEE, Cameron, Missouri. The construction permit for Station KDEE, Cameron, was modified to specify operation on Channel 261C2 in MM Docket 89-558.[5] The grant of a license for Station KCCV-FM may be withheld until Station KDEE is licensed on Channel 261C2. We shall propose to modify the construction permit for Station KCCV-FM, Channel 222A, to specify operation on Channel 222C3 in accordance with Section 1.420(g) of the Commission's Rules. In response to Escriva's petition, we shall propose to substitute Channel 223C3 for Channel 223A at Topeka, Kansas, and modify the construction permit for Channel 223A to specify operation on the higher class channel. Channel 223C3 can be allotted to Topeka, Kansas, in compliance with the Commission's spacing requirements at petitioner's specified site.[6] We note that Channel 223C3, Topeka, is short spaced to the allotment site for Channel 222A, Olathe, but fully spaced to the construction permit for Channel 222A (BPH-880421NH). We shall propose to modify the construction permit for Channel 223A, Topeka, to specify operation on Channel 222C3 in accordance with Section 1.420(g) of the Commission's Rules.

5. We believe that the public interest would be served by seeking comments on these proposals for the reasons stated above. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

---

[1] An application for the assignment of the construction permit of Station KVUQ(FM), Olathe, from Marianne S. Harbart to Bott Broadcasting Company was granted on July 1, 1992 (BAPH-920515HC). Ms. Harbart has filed a statement consenting to the filing of this petition. The call sign for Station KVUQ(FM) was changed to KCCV-FM, effective July 31, 1992.

[2] The construction permit was granted April 3, 1992, in MM Docket No. 89-293, FCC 92D-27 (effective May 26, 1992).

[3] The coordinates for Channel 222C3 at Olathe are 38-58-46 and 94-50-44.

[4] The coordinates for Channel 257A at Topeka are 39-07-33 and 95-41-08.

[5] *See* 7 FCC Rcd 2192 (1992).

[6] The coordinates for Channel 223C3 at Topeka are 39-05-31 and 95-47-05.

City	Channel No. Present	Proposed
	OPTION I	
Olathe, Kansas	222A	222C3
Topeka, Kansas	223A, 247C, 262C, 295C, 299C	247C, 257A, 262C, 295C, 299C
	OPTION II	
Topeka, Kansas	223A, 247C, 262C, 295C, 299C	223C3,247C, 262C, 295C, 299C

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Margaret Escriva, the permittee of Channel 223A, Topeka, Kansas, SHALL SHOW CAUSE why its construction permit should not be modified to specify operation on Channel 257A in lieu of Channel 223A.

7. Pursuant to Section 1.87 of the Commission's Rules, Margaret Escriva, may, not later than **November 23, 1992,** file a written statement showing with particularity why its construction permit should not be modified as proposed in the Order to Show Cause. The Commission may call on Margaret Escriva to furnish additional information. If Margaret Escriva raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Margaret Escriva will be deemed to have consented to the modification as proposed in the Order to Show Cause and a final Order will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the secretary of the Commission Shall Send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Meredith S. Senter, Jr.
Stephen D. Baruch
Leventhal, Senter
& Lerman
2000 K Street, N.W.,
Suite 600
Washington, D. C. 20006-1809

Cameron Radio, Inc.
Station KDEE
Rt. 1, Box 29A
Cameron, Missouri 64429

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **November 23, 1992,** and reply comments on or before **December 8, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Meredith S. Senter, Jr.
Stephen D. Baruch
Leventhal, Senter
& Lerman
2000 K Street, N.W.,
Suite 600
Washington, D.C. 20006-1809

Harry C. Martin
Cheryl A. Kenny
Reddy, Begley
& Martin
1001 22nd Street, N.W.,
Suite 350
Washington, D.C. 20037

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-221

In the Matter of

Amendment of Section 73.202(b), RM-8071
Table of Allotments,
FM Broadcast Stations.
(Quincy and Susanville,
California)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 9, 1992; Released: October 2, 1992

Comment Date: November 23, 1992
Reply Comment Date: December 8, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Olympic Broadcasters, Inc. ("petitioner"), licensee of Station KQNC(FM), Quincy, California, requesting the reallotment of Channel 271A to Susanville, California, as a Class C2 channel, and modification of its license accordingly.[1] Petitioner stated its intention to apply for Channel 271C2 if allotted to Susanville, as requested.

2. In support of its proposal, petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules. Petitioner states that the proposed allotment of Channel 271C2 at Susanville (population 7,279),[2] is mutually exclusive with the present allotment of Channel 271A at Quincy (population 2,700). The distance between Quincy and the site suggested by the petitioner at Susanville is 52.5 kilometers (32.4 miles), whereas Section 73.207(b)(1) requires a minimum distance separation of 166 kilometers (103 miles) between co-channel Class A and C2 stations. Petitioner states that its proposal would provide an additional competitive transmission service to Susanville,[3] and would not deprive Quincy of local service.[4]

3. We believe the proposal warrants further consideration since it could provide the larger community of Susanville with an additional local transmission service without depriving Quincy of its sole local broadcast service, and could permit Station KQNC(FM) to operate at increased power. We will also propose to modify petitioner's license for Station KQNC(FM) to specify operation on Channel 271C2 at Susanville, California, as requested. In accordance with the provisions of Section 1.420(g) and (i) of the Commissions Rules, we will not accept competing expressions of interest in the use of Channel 271C2 at Susanville, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Quincy, California	240A, 262C3, 271A	240A, 262C3
Susanville, California	227C, 242C	2227C, 242C2, 271C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 23, 1992,** and reply comments on or before **December 8, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Richard A. Helmick, Esq.
Cohn and Marks
1333 New Hampshire Ave., N.W.
Suite 600
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table

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[1] Although petitioner is presently licensed on Channel 271C2 at Quincy, it was downgraded to Channel 271A to accommodate the modification of its commonly owned Station KFIA-FM, Shingle Springs, California. *See* 7 FCC Rcd 3113 (1992). Petitioner has filed an application to implement the downgrade at Quincy (File No. BPH-920730IG).

[2] Population figures reported herein are from the 1990 U.S. Census.

[3] Susanville presently has two local aural transmission services provided by fulltime Station KSUE(AM) and Station KSUE-FM, Channel 227C. Although a third service has been authorized at Susanville for Station KKLC(FM), Channel 242C3 (File No. BPH-910204MZ), the facility is currently off the air.

[4] In addition to Station KQNC(FM), Quincy is served by fulltime Station KPCO(AM). Additionally, construction permits have been issued to Station KNLF(FM) on Channel 276A and to Station KSPY(FM) on Channel 262A at Quincy. Station KNLF(FM) was recently modified to specify operation on Channel 240A. *See* 7 FCC Rcd 1318 (1992). Station KSPY(FM) has been modified to specify operation on Channel 262C3 at Quincy. *See* 7 FCC Rcd 3899 (1992).

of Allotments. Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-220

In the Matter of

Amendment of Section 73.202(b), RM-8075
Table of Allotments,
FM Broadcast Stations.
(Moose Lake, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 8, 1992; Released: October 2, 1992

Comment Date: November 23, 1992
Reply Comment Date: December 8, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Agate Broadcasting of Minnesota ("petitioner"), seeking the allotment of Channel 296C3 to Moose Lake, Minnesota, as that community's first local broadcast service. Petitioner provided an engineering study in support of the petition and indicated it would apply for the channel, if allotted.

2. We believe the proposal warrants consideration because the proposed allotment would provide a first local service to Moose Lake. Channel 296C3 can be allotted to Moose Lake, consistent with the Commission's Rules without a site restriction.[1] Since Moose Lake is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment.

3. In view of the fact that the proposed alotment would provide a first local service to Moose Lake, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Moose Lake, Minnesota	---	296C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 23, 1992,** and reply comments on or before **December 8, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Brian T. Grogan
Moss & Barnett
4800 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4129

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 296C3 at Moose Lake are 46-27-24 and 92-45-30.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-219

In the Matter of

Amendment of Section 73.202(b), RM-8039
Table of Allotments,
FM Broadcast Stations.
(Tarkio, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 8, 1992; Released: October 2, 1992

Comment Date: November 23, 1992
Reply Comment Date: December 8, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by KANZA, Inc. ("petitioner"), requesting the substitution of Channel 228C3 for Channel 228A at Tarkio, Missouri. Petitioner also requests modification of its license for Station KTRX(FM), Channel 228A, to specify operation on Channel 228C3. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration. Channel 228C3 can be allotted to Tarkio, Missouri, consistent with the Commission's spacing requirements at petitioner's specified site.[1] We shall also propose to modify the license for Station KTRX(FM), Channel 228A, to specify operation on Channel 228C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. We believe the public interest would be served by proposing the substitution of Channel 228C3 for Channel 228A at Tarkio, Missouri, since it could provide the community with expanded local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Tarkio, Missouri	228A	228C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 23, 1992,** and reply comments on or before **December 8, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John R. Wilner
Bryan Cave
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20006-3960

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 228C3 at Tarkio are 40-33-50 and 95-15-00.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-225

In the Matter of

Amendment of Section 73.202(b), RM-8073
Table of Allotments,
FM Broadcast Stations.
(Northport, Alabama and
Macon, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 11, 1992; Released: October 2, 1992

Comment Date: November 23, 1992
Reply Comment Date: December 8, 1992

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed by Warrior Broadcasting, Inc. ("petitioner"), licensee of Station WLXY(FM), Channel 264A, Northport, Alabama, requesting the substitution of Channel 264C3 for Channel 264A at Northport and modification of its license accordingly to specify operation on the higher powered channel. Additionally, in order to accommodate the proposal in conformity with minimum distance separation requirements, petitioner requests the deletion of vacant Channel 263A at Macon, Mississippi,[1] or alternatively, the placement of a site restriction on the existing Macon allotment. Petitioner stated its intention to apply for Channel 264C3, if allotted to Northport, as requested.[2]

2. A staff engineering analysis has determined that Channel 264C3 can be allotted to Northport, Alabama, in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules at the petitioner's specified site located 15.2 kilometers (9.4 miles) west of the community,[3] provided that vacant Channel 263A is site restricted 10 kilometers (6.2 miles) west of Macon.[4] Petitioner should provide a reasonable assurance that a transmitter site conforming to the site restriction is available at Macon. *See Cave City and Radcliff, Kentucky, and Santa Claus, Indiana*, 7 FCC Rcd 1363 (1992). We will delete the Macon channel if no expression of interest in retaining the channel is filed.

3. We believe the public interest would be served by consideration of petitioner's proposal since it could provide Northport with a wide coverage area FM service. Therefore, we shall propose to modify the license for Station WLSY(FM) as requested. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 264C3 at Northport, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the above, the Commission believes it is appropriate to solicit comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

OPTION I

	Channel No.	
City	Present	Proposed
Northport, Alabama	264A	264C3
Macon, Mississippi	263A	–

OPTION II

Northport, Alabama	264A	264C3
Macon, Mississippi	263A	263A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 23, 1992,** and reply comments on or before **December 8, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with

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[1] Petitioner states that Channel 263A was allotted to Macon, Mississippi, in MM Docket No. 85-263. *See Report and Order* (MM Docket 85-263), 51 Fed. Reg. 23763, July 1, 1986. An application for Channel 263A was granted on March 2, 1987. However, after several extensions and an assignment of the permit were granted, the station remained unbuilt. Ultimately, the construction permit issued to WMXG, Inc. (File No. BPH-890531JJ) was forfeited and cancelled by letter on June 23, 1992. WMXG, Inc. did not request reconsideration, and consequently the Commission's action became final on July 23, 1992.

In the event Channel 263A is retained in Macon, a new filing window will be opened therefor upon the termination of this proceeding.

[2] Although petitioner's request was signed, it failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. Petitioner is requested to correct this omission in its comments.

[3] Coordinates for Channel 264C3 at Northport are 33-16-00 and 87-44-01. The site restriction is required to avoid a short-spacing to the licensed site of Station WHMA-FM, Channel 263C, Anniston, Alabama, at reference coordinates 33-37-38 and 85-53-25.

[4] Coordinates used for Channel 263A at Macon are 33-05-10 and 88-39-48.

the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Warrior Broadcasting, Inc.
Attn: James E. Shaw, President
3330 Main Avenue
P.O. Box 1020
Northport, Alabama 35476

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments. Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 10, 1992

COMMISSION ANNOUNCES LOTTERY FOR RANK ORDERING OF 220-222 MHZ PRIVATE LAND MOBILE "LOCAL" CHANNELS

The Federal Communications Commission will conduct a lottery on October 19, 1992 at 10:30 AM in Room 856, 1919 M St., N.W., Washington, D.C. for the purpose of rank ordering the applications received for "local" channels in the 220-222 MHz band. Applications for these frequencies were filed in response to a Report and Order adopted March 14, 1991 (*Report and Order*, PR Docket No. 89-552, FCC 91-74 (April 17, 1991)) and subsequently summarized in the Federal Register (56 Fed. Reg. 19598 (1991)). Applications were accepted by the Commission for these channels starting on May 1, 1991. Over 58,000 applications were received by May 24, 1991, at which time the Commission ceased accepting any further applications. Applications for these frequencies were accepted on a "first come, first served" basis, with all applications received on the same day being considered filed at the same time. There are more applications for licenses than can be accommodated with available frequencies. Based on an initial analysis of the applications, it has been determined that there are no substantial, material differences between them that necessitate comparative hearings.[1] There are no financial qualifications required for applying for such licenses, and no preferences will be awarded to any applicant. Accordingly, use of lotteries to resolve situations where there are no substantial, material differences in applications and there are more applications than there are available frequencies will significantly benefit the public interest by expediting delivery of the proposed services to potential users. The lottery will be conducted pursuant to authority contained in Section 1.972 of the Commission's Rules. The lottery to be held on October 19, 1992 will be for the purpose of rank ordering all of the applications for "local" 220-222 MHz channels that were received on the first day that they were accepted for filing, *i.e.*, May 1, 1991.

A listing of the applications that will be the subject of this rank ordering lottery is available for public inspection during regular business hours at the following locations: 1) the Mass Media/Adjudication Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Room 239, Washington, D.C. 20554; 2) the Licensing Division Reference Room, Private Radio Bureau Licensing Division, 1270 Fairfield Road, Gettysburg, Pennsylvania 17325-7245; 3) all Field Locations of the Federal Communications Commission's Field Operations Bureau (see attachment for Field Location addresses); 4) the Authorization and Evaluation Division of the Office of Engineering and Technology, 7435 Oakland Mills Road, Columbia, Maryland 21046; 5) the Field Office of the Common Carrier Bureau, 90 Church Street, Room 1309-X, New York, New York 10007; 6) The Public Services Division of the Associate Managing Director for Public Information and References Services, 1919 M Street, N.W., Room 254, Washington, D.C. 20554; and 7) The Federal Communications Commission Library, 1919 M Street, N.W., Room 639, Washington, D.C. 20554.

Copies or excerpts of the list of applications may also be purchased from the Commission's duplicating contractor: Downtown Copy Center, 1990 M Street, N.W., Suite 640, Washington, D.C. 20036, (202) 452-1422.

The applications are listed by service requested and then alphabetically by applicant name. The list also includes the geographic coordinates of the station applied for and the file number associated with the application. It is this file number that will be listed in the computer printout that provides the rank ordering for all of the applications. Any applicant that believes there is an error in this listing should contact our Gettysburg licensing facility and provide the correct information. Any proposed corrections will be verified against the information contained in the applicant's original application. Additionally, interested parties may provide information to the Commission that may reflect on the suitability of an applicant to be a licensee. Corrections to the listing and information about the suitability of an applicant to be a licensee must be received within thirty (30) days of the publication of this Public Notice in the *Federal Register* at the following address by 4:30 PM EDT: Federal Communications Commission, Private Radio Bureau Licensing Division, Land Mobile Branch, 1270 Fairfield Rd., Gettysburg, PA 17325-7245, Attn: 220 MHz Local Applications. Modifications to applications *will not be accepted* at this time. Only errors that have arisen in the preparation of this list or matters that reflect on the suitability of an applicant to be a licensee should be brought to the attention of our Gettysburg office. These applications will then be processed by our Gettysburg licensing facility in the order in which they were ranked by the lottery in accordance with the criteria established in the March 14, 1991, Report and Order. Allegations pertaining to tentative selectees will be investigated and resolved prior to issuance of any license to that applicant; however, processing of lower ranked applications will continue during the pendency of such investigation under the assumption that the license will be granted. Applications that cannot be granted because of conflicts with higher ranked, earlier granted applications, will be dismissed. Allegations against applications that have been dismissed will not be investigated.

On July 30, 1992, certain aspects of the Commission's procedures for filing and acceptance of 220-222 MHz license applications were appealed to the United States Court of Appeals for the District of Columbia Circuit. *See Evans* v. *Federal Communications Commission*, No. 92 - 1317 (D.C. Cir. filed July 30, 1992). As a result, we will condition all grants of 220-222 MHz licenses upon the outcome of this appeal. During the pendency of the appeal, licensees may construct their facilities at their own risk. We will, however, grant each 220-222 MHz local licensee an automatic extended construction period of 120 days from the date of this appeal's final disposition by the courts, by which time the licensed facilities must be constructed and placed in operation.

[1] 47 CFR § 1.972

As announced in our Public Notice of June 18, 1992 (DA 92792), the rank ordering of these applications will be through the use of a computer-assisted random number selection process. The computer program to be employed requires the input of a "seed number" to initiate the generation of numbers. The seed number will be selected through the use of forced-air ping pong balls at the beginning of the random selection process and will be entered into the computer program. The computer will then generate a series of random numbers that will be associated with the file number of each application. During the rank ordering session, the computer will print out the results of the rank ordering exercise, which will be made available for public inspection. The entire random selection process will be held in the Commission Meeting Room and will be open for public viewing.

For a more complete discussion of lottery procedures, see FCC INST 1159.1, released August 13, 1992. Additional information regarding the applicants for this lottery session may be obtained from the Private Radio Bureau's Consumer Assistance Branch at (717) 337-1212. Procedural questions regarding the lottery may be directed to Donna Searcy at (202) 632-6410.

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Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 21, 1992

PUBLIC COMMENT INVITED ON ALPHA LYRACOM REQUEST FOR WAVIER OF SECTION 319(d) OF THE COMMUNICATIONS ACT

Alpha Lyracom d/b/a Pan American Satellite (PAS) has requested a waiver of Section 319(d) of the Communications Act, as amended, to authorize it to continue to make expenditures up to an additional $130 million toward the construction (including prelaunch expenditures) of its first Pacific Ocean Region satellite, PAS-4. The Commission has granted PAS a conditional authorization to construct, launch, and operate the proposed PAS-4 system. In its grant, the Commission stated that PAS shall not begin construction until PAS demonstrates sufficient non-contingent funds to meet its projected construction, launch and first-year operational costs. The Commission noted that in order to allow construction to proceed prior to this time, PAS would need to secure a waiver pursuant to Section 319(d) of the Communications Act.

The Common Carrier Bureau has previously authorized PAS to expend funds to commence construction of PAS-4, including grant of a partial waiver to expend up to $10 million of the $130 million PAS requested on August 3, 1992. *See* File No. CSS-91-003. In its authorization, dated September 17, 1992, the Bureau stated that action would be taken at a later date on PAS' request to spend up to an additional $120 million. Parties are invited to file comments in response to this request no later than October 2, 1992. Replies should be filed no later than October 14, 1992. Comments should reference File No. CSS-91-003. Parties should file an original and four copies of their comments and replies with the Secretary, FCC, and additionally send one copy of each pleading to Ms. Susan Lee O'Connell, International Policy Division, Common Carrier Bureau, 1919 M Street, N.W., Room 534, Washington, D.C. and to Downtown Copy Center (DCC), 1990 M Street, N.W., Suite 640, Washington, D.C. 20036, (202) 452-1422. Copies of all pleadings filed are available for public inspection and copying in the International Facilities Division public reference room, 1919 M Street, N.W., Room 533, Washington, D.C. Copies are also available from DCC.

For further information contact Susan Lee O'Connell at (202) 632-3214.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Island Telephone Company, AAD 91-55

Telephone and Data Systems, Inc., and

Contel of Maine, Inc.

Petition for Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary, of the Commission's Rules

Petition for Waiver of Sections 61.41(c) and 69.3(e)(11), and Temporary Waiver of Section 69.605, of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: September 14, 1992; Released: September 23, 1992

By the Deputy Chief (Operations), Common Carrier Bureau:

1. On July 31, 1991, the Island Telephone Company, Inc. (Island) and Telephone and Data Systems, Inc. (TDS) filed a petition for waiver of the Commission's definition of "study area"[1] and of certain rules pertaining to price cap regulation,[2] based on Island's acquisition of two telephone exchanges serving 368 access lines from Contel of Maine, Inc. (Contel).[3] On September 3, 1991, Contel filed a Supplementary Petition also seeking waiver of the definition of "study area." We published a public notice soliciting comments on these requests on September 24, 1991, and received comments from two parties.[4] On July 17, 1992, Island informed the Commission by letter that the Maine Public Utilities Commission (Maine) had approved the transaction; on July 27, Island filed a copy of the Maine order.

I. STUDY AREA WAIVER

2. The definition of study area contained in Part 36, Appendix-Glossary,[5] of the Commission's rules states that study area boundaries shall be frozen as they were on November 15, 1984. Companies wishing to change their study area boundaries can request a waiver of that rule. The Commission's three primary concerns in study area boundary change petitions are that the change have no adverse impact on the Universal Service Fund (USF) support program,[6] that the state commission(s) having regulatory authority not oppose the change,[7] and that the public interest be served.

3. The service area in question here consists of two small islands (Matinicus and Swan's Island) off the coast of Maine. Island seeks a waiver of the study area definition to consolidate the two exchanges acquired from Contel into Island's study area. Contel seeks a waiver of the study area definition to allow it to remove these exchanges from its study area.

A. Universal Service Fund (USF) Impact

4. USF support is calculated based on the cost per loop. Island/TDS states that it estimates USF support for the two exchanges in question here at $15,000; the proposed consolidated, four-exchange study area on average schedule would receive about $29,000 from the USF. Island/TDS states that this is an insignificant amount when viewed in the context of the total USF fund of $472 million. We note, however, that high cost support would nearly double under Island/TDS' own calculations; while the dollar amount may be small, the change is significant. Nonetheless, the public interest benefits of a transaction can outweigh our reluctance to grant a waiver that would result in increasing USF support. In the case presented here, Island/TDS states that each exchange serves a small island community with few subscribers, that much of the plant serving each is antiquated, that all four switches (one for each exchange) are in poor condition, and that each has a microwave hop to the mainland with towers and equipment that need replacing. These parties propose, with a consolidated study area, to increase efficiency by installing a single upgraded switch and a single microwave hop to the mainland with hops to collect traffic from the islands, and by moving the base of operations closer to the islands. Construction, renovation and upgrading are included in the terms attached to the Maine order.

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[1] Appendix-Glossary of Part 36 of the Commission's rules, 47 C.F.R. Part 36 Appendix-Glossary.

[2] Island and TDS seek waiver of Section 61.41(c), 47 C.F.R. §61.41(c), the price cap "all or nothing" rule that stipulates that any acquisition of a price cap carrier by a non-price cap carrier, or of a non-price cap carrier by a price cap carrier, will result in the consolidated entity's falling under price cap regulation. They also ask waiver of Section 69.3, 47 C.F.R. §69.3, to allow Island to continue to participate in the NECA pool, and of Section 69.605, 47 C.F.R. §69.605(c), to allow Island to add the new exchanges to its average schedule settlements pending the completion of cost studies.

[3] TDS joined in Island's petition because TDS had a contract to acquire all the stock of Island. On April 30, 1992, that sale was approved by the Maine commission.

[4] Public Notice, DA 91-1146, released Sept. 24, 1991. Comments were filed by the United States Telephone Association (USTA) and the National Exchange Carrier Association (NECA) in support of the waiver.

[5] 47 C.F.R. Part 36, Appendix-Glossary.

[6] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984) (*Joint Board Order*), at para. 65.

[7] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 5 FCC Rcd 5974 (1990). The Commission therein describes the factors that led to the present restriction on study area changes and the reasons why it is proposing to change that restriction.

5. In such a case, where there is a clear and distinct benefit to the public interest, we find good cause to support grant of a waiver despite the increase in high cost support that will result. *See Gila River Order.*[8]

B. State commission approval

6. The supplement filed by Island on July 27, 1992, contains a copy of the order by the Maine Public Utility Commission approving the transfer.[9] This commission action addresses our concerns regarding state approval.

II. PRICE CAP "ALL OR NOTHING" WAIVER

7. Island/TDS also request waiver of the Commission's rules governing the acquisition of price cap companies by non-price cap companies. Section 61.41 of the Commission's rules provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.[10] Under this rule, Island/TDS's acquisition of the Contel exchange obligates it to exit the NECA pools and become subject to price cap regulation. Island/TDS requests waiver of this rule because the rule's application here would be contrary to the public interest. Island/TDS notes the construction and upgrading program discussed above, and contends that application of the rule would thwart its infrastructure development.

8. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[11] The rationale for this rule is stated in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift its costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) without affecting the earnings of the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Second, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to an efficient level. *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706 (cites omitted). The Commission stated, however, that "in some cases, the efficiencies created by the purchase and sale of one or two exchanges may outweigh the threat of 'gaming the system.' Such cases might justify narrow waiver of the all-or-nothing rule." *Id.* at note 207.

9. There is good cause to grant Island/TDS a waiver of the all-or-nothing rule. The first concern cited by the Commission -- cost-shifting between affiliates -- is not at issue here. Neither Island/TDS nor Contel is seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rule -- allowing a company to use mergers and acquisitions as a means of choosing regulatory systems and "gaming" -- is also not raised on the facts of this case. Except for the exchanges it has sold to Island/TDS, Contel remains regulated under price caps; it retains no ability to bring these exchanges back under price caps.

10. Further, the Commission has always been sensitive to the administrative burdens imposed on small carriers by the application of Commission rules.[12] In the *LEC Price Cap Order*, the Commission recognized that small telephone companies should not be forced into a regulatory regime that was designed based largely on the historical performance of the largest local exchange carriers. The Commission therefore made price cap regulation optional for carriers below the largest eight. Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Companies, our application of the all-or-nothing rule must take into account the companies' preference, particularly for small carriers.

11. We therefore grant a waiver of the all-or-nothing rule. For the present, Island/TDS will be regulated under rate of return, subject to the temporary waiver granted herein to allow it to be regulated under average schedules until year-end 1993. Island/TDS also requests waiver of Section 69.3, to allow it to remain a participant in the NECA pools. Because we are waiving Section 61.41, allowing Island/TDS to remain outside price cap regulation, Island/TDS need not withdraw from the NECA pools, and Section 69.3 is not triggered, so no waiver is necessary. Island/TDS will be free to elect price cap regulation in the future, provided it withdraws from the NECA pools.

III. AVERAGE SCHEDULE WAIVER

12. Island, which currently operates under average schedules, requests temporary waiver of Sections 69.605(c) and 69.3(e)(11) to allow consolidated operation under average schedules until cost data can be prepared for the four exchanges comprising Island. Island states that the two current Island exchanges have little or no cost data because they have been under average schedule, and that the two exchanges Island is acquiring from Contel have inadequate cost data because they have been under price cap regulation.

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[8] US West Communications and Gila River Telecommunications, Inc., AAD 91-2, Memorandum Opinion and Order, DA 92-351, released March 24, 1992 (*Gila River Order*).

[9] Maine Public Utilities Commission Order, Docket No. 90-340, released June 2, 1992.

[10] 47 C.F.R. Section 61.41(c)(2). Section 69.3(e)(11) states that "any changes in Association common line tariff participation and Long Term and Transitional Support resulting from the merger or acquisition of telephone properties are to be made effective on the next annual access tariff filing effective date following consummation of the merger or acquisition transaction...."

[11] Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), *petitions for further recon. pending, appeal docketed sub nom. D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

[12] *See, e.g.*, Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rulemaking, 2 FCC Rcd 1010 (1986); Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988) (*Small Company Order*).

13. Island states that the waiver of Section 69.3(e)(11) is needed to allow a change in its NECA tariff participation before the next annual tariff effective date; Island argues that it is impractical to operate the two exchanges even temporarily on a stand-alone basis. Island contends that these two exchanges have no tariffs, nor data to develop them, and says that their tiny size means their inclusion in average schedules will not adversely affect NECA. Island states, however, that it (or TDS) will be able to develop, by year-end 1993, cost data sufficient to assume cost company status.

14. Because of the potential that exists for carriers to inflate revenue requirements artificially, the Commission has only infrequently permitted exchange carriers to convert to average schedule status. However, we conclude that a waiver is in the public interest under the uniquely limited circumstances of this case. That conclusion is premised upon the following factors: (1) Island is a small telephone company (four exchanges, 448 access lines); (2) although TDS will acquire the four exchanges from Island, this transaction does not appear to be part of a pattern of asset transfers between TDS and Contel, or among TDS, Contel, or any other exchange carrier, designed to materially increase interstate revenue requirements, or having that effect; (3) the effect upon average schedule interstate revenue requirements will be of limited duration; (4) Island will convert to cost basis and provide cost studies; and (5) no reasonable alternative appears to exist.

15. In particular, a limited waiver in this case will serve the public interest, without undue risk to interstate ratepayers, because of the limited duration of average schedule treatment, and because there appears to be no reasonable alternative. In addition, there is no indication that TDS contemplates further exchanges of assets (below the study area level), or further requests for waiver of study area boundaries or average schedule status, that would trigger the need for a comprehensive investigation. Under these unique and limited circumstances, we believe approving Island's waiver request is in the public interest.

IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the petitions of Island Telephone Company, Inc., Telephone and Data Systems, Inc., and Contel of Maine, Inc., for waiver of Appendix-Glossary of Part 36 of the Commission's rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED to the extent set forth above.

17. IT IS FURTHER ORDERED that the Petition of Island Telephone Company, Inc. and Telephone and Data Systems, Inc. for waiver of Section 69.605 of the Commission's rules, 47 C.F.R. §69.605, IS GRANTED until year-end 1993, and otherwise to the extent discussed herein.

18. IT IS FURTHER ORDERED that the Petition of Island Telephone Company, Inc. and Telephone and Data Systems, Inc. for waiver of Section 61.41(c) of the Commission's rules, 47 C.F.R. §61.41(c)(2), IS GRANTED.

19. IT IS FURTHER ORDERED that the Petition of Island Telephone Company, Inc. and Telephone Data Systems, Inc. for waiver of Section 69.3(e)(11) of the Commission's Rules, 47 C.F.R. §69.3(e)(11), IS GRANTED to the extent necessary to effect the temporary grant, shown above, of a waiver of Section 69.605.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Review of Parts 1 and 73
of the Commission's Rules

ORDER

Adopted: September 25, 1992; Released: September 28, 1992

By the Chief, Mass Media Bureau:

1. On October 1, 1992, the Office of the Federal Register will issue the 1992 Code of Federal Regulations (CFR) for Title 47. In order to make the new CFR as accurate possible, we have reviewed the 1991 edition and identified outmoded and/or inconsistent information. Accordingly, this *Order* amends the Commission's Rules to reflect these editorial changes to 47 CFR Parts 1 and 73. This *Order* makes no substantive changes that impose additional burdens or remove provisions relied upon by licensees or the public. For this reason, we believe that this revision will serve the public interest. This information is amended as part of the Agency's oversight function.

2. This amendment is implemented by authority delegated by the Commission to the Chief, Mass Media Bureau. Because this amendment only interprets and clarifies the existing language of Parts 1, 73, prior notice of rule making is not required. 47 CFR Section 1.412(c). For this same reason, this amendment may become effective upon publication in the *Federal Register*. 47 CFR Section 1.427(b). Because a general notice of proposed rule making is not required, the Regulatory Flexibility Act does not apply.

3. Therefore, IT IS ORDERED, That pursuant to Sections 4, 5, and 303, of the Communications Act of 1934, as amended, and Sections 0.61 and 0.283 of the Commission's Rules, Parts 1 and 73 of the FCC Rules and Regulations ARE AMENDED as set forth below, effective upon publication in the *Federal Register*.

4. For further information on this *Order*, call Rita S. McDonald, Policy and Rules Division at (202) 632-5414.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX

47 CFR Part 1 is amended as follows:

5. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended, 47 U.S.C. 154 and 303.

6. The parenthetical reference to §1.15 in the last sentence of Section 1.80(f)(2) is revised to §1.5.

7. Section 1.2003 is amended by adding a new form to the list of forms to read as follows:

Section 1.2003 Applications affected.

* * * * *

302-FM Application for FM Broadcast Station License.

* * * * *

47 CFR Part 73 is amended as follows:

8. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

9. Section 73.232 is amended by revising the phrase "rebroadcast by one station or programming from another" in the third sentence, to "rebroadcast by one station of programming from another."

10. Section 73.295 is amended by revising the first sentence in paragraph (a) to read as follows:

Section 73.295 FM subsidiary communications services.

(a) Subsidiary communication services are those transmitted on a subcarrier within the FM baseband signal, but do not include services which enhance the main program broadcast service, or exclusively relate to station operations (see § 73.293). * * *

* * * * *

11. Section 73.310 is amended by revising the definition of frequency swing in paragraph (a) to read as follows:

Section 73.310 FM technical definitions

(a) * * * * *

Frequency swing. The peak difference between the maximum and the minimum values of the instantaneous frequency of the carrier wave during modulation.

* * * * *

12. Section 73.313 is amended by revising the reference to determing in the second sentence of paragraph (d) to determining.

13. Section 73.319 is amended by revising the reference to airthmetic in the last sentence in paragraph (d)(1) to arithmetic.

14. Section 73.644 is amended by revising the reference to §73.687(i) in paragraph (b)(1) to §73.687(e)

15. Section 73.1010 is amended by revising paragraph (a)(4) and by adding paragraph (a)(7) to read as follows:

Section 73.1010 Cross reference to rules in other parts.

* * * * *

(a) * * *

(4) Subpart G," Schedule of Statutory Charges and Procedures for Payment". (§§1.1101 to 1.1117).

* * * * *

(7) Subpart P, "Implementation of the Anti-Drug Abuse Act of 1988". (§§1.2001-1.2003).

* * * * *

16. Section 73.1125 is amended by revising the reference to §73.24(j) in paragraph (a) to §73.24(i).

17. Section 73.1225 is amended by revising the reference to part 1 of the FCC rules in paragraph (b) to part 0, and by revising paragraph (d)(3)(iii) to read as follows:

Section 73.1225 Station inspection by FCC.

* * * * *

(d) * * *

(3) * * *

(iii) Section 73.61, AM direction antenna field strength measurements.

18. Section 73.1620 is amended by removing the parenthetical reference to FCC Form 302 in the first complete sentence in paragraph (g).

19. Section 73.3500 is amended by adding a new form to the list of forms to read as follows:

Section 73.3500 Application and report forms.

* * * * *

Form number	Title
* * * * *	
302-FM	Application for FM Broadcast Station License.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-140

In re

Revision of
Radio Rules and Policies

MEMORANDUM OPINION AND ORDER AND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: August 5, 1992; Released: September 4, 1992

Comment Date: October 30, 1992
Reply Comment Date: November 15, 1992

By the Commission: Chairman Sikes, Commissioner Barrett and Commissioner Duggan each issuing a separate statement

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I. INTRODUCTION

1. This *Memorandum Opinion and Order* disposes of issues raised in 20 petitions for reconsideration of the *Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755 (1992), and in related pleadings.[1] In the *Report and Order*, the Commission significantly relaxed the local and national radio ownership rules and included certain local time brokerage agreements within the scope of the new ownership restrictions.[2] By this *Memorandum Opinion and Order*, we further modify the national and local ownership limits adopted in the *Report and Order*, and clarify various aspects of that decision.

2. The *Report and Order* detailed the dramatic increase in competition and diversity in the radio industry over the last decade, noting that there are now over 11,000 radio stations in the United States. We observed as well that the number of non-radio outlets competing with radio stations for audiences and advertising revenue has risen substantially over the same period. There are, for example, nearly 1,500 operating television stations, and cable television now serves 64 percent of U.S. homes, up from only 25 percent in 1980. Cable services directly competitive with the popular music services that are central components of commercial radio programming have also emerged. MTV and VH-1 are available to more than 56 million and 41 million homes, respectively, while the number of 24-hour cable radio networks has more than doubled since 1984. We concluded in the *Report and Order* that this intense inter- and intra-industry competition has produced an extremely fragmented radio marketplace in which existing and future radio broadcasters will be subject to increasingly severe economic and financial stress. We noted that between 1985 and 1990, the growth rate of radio station revenues dropped nearly in half to, on average, six percent, while real per station revenue during this period remained virtually unchanged. Operating profits, on a per station basis, have fallen dramatically since peaking in 1988, and radio's share of local advertising revenues remained essentially flat throughout the 1980s. More than half of all radio stations lost money in 1990,[3] and almost 300 stations are currently silent. Moreover, the *Report and*

[1] A list of parties filing petitions, oppositions to petitions and replies to oppositions is attached as Appendix B.

[2] The new rules were originally scheduled to take effect on August 1, 1992. Motions for stay of the August 1 effective date were filed by several parties. On July 30, 1992, these requests were granted and the effective date of the new rules was stayed pending resolution of the petitions for reconsideration. *Order Deferring Effective Date* in MM Docket No. 91-140, FCC 92-351 (released July 30, 1992), 57 Fed. Reg. 35763 (August 11, 1992). That stay is lifted on the effective date of the rule amendments adopted herein.

[3] This trend has apparently continued; NAB reports that 58 percent of all radio stations lost money in 1991. NAB Press Release, July 2, 1992.

Order found that the competitive changes producing this stress are not cyclical or transient in nature, but persistent and likely to create even greater pressure on radio broadcasters in the future. The picture is especially bleak for small market stations, which comprise the bulk of the industry. Given these circumstances, the Commission concluded that radio's ability to serve the public interest has been substantially threatened.

3. In the face of this threat, the Commission rigorously reevaluated the validity of its existing ownership restraints to determine whether they unduly restricted the flexibility of radio licensees to adapt to changing market conditions and to obtain the substantial efficiencies that common ownership can provide. These efficiencies include the opportunity to "combine administrative, sales, programming, promotion, production and other functions as well as to share studio space and equipment."[4] Ultimately, we concluded that continued insistence on absolute ownership diversity at the local level and restraint of national ownership at existing 12-station levels would needlessly deny radio broadcasters the benefits of broader common ownership at a time when these benefits may prove critical to their survival. Indeed, we found that increased levels of common ownership could directly advance our underlying interest in promoting diversity and competition. Stations that are silent or severely stressed financially cannot provide the service to the public which the Communications Act contemplates. Moreover, the very robustness of competition in radio markets which is largely responsible for the economic distress many licensees face today also attenuates our concern for the impact on diversity and competition that permitting increased ownership levels might entail.

4. The rules adopted in the *Report and Order* thus relaxed the national ownership caps to allow a single licensee to own up to 30 AM stations and 30 FM stations nationwide. We also modified the local ownership rule to permit a single owner to own an increased number of stations within a local radio market, depending on market size. For all but the smallest markets, we adopted a 25 percent cap on the combined audience share of all owned stations, based on shares at the time of any new station acquisition. We also limited simulcasting on commonly owned stations in the same service serving substantially the same area to 25 percent of the broadcast schedule. We restricted local time brokerage by providing that if a station licensee programs more than 15 percent of the time of another station and the principal community contours of the brokering and brokered stations overlap, then the brokered station, and its market share, would be counted against the brokering station's permissible ownership levels in determining its compliance with the revised radio ownership rules. We also required that time brokerage contracts be placed in the stations' public inspection files, and that local brokerage agreements that would be attributed to the broker for purposes of the Commission's ownership rules be filed with the Commission within 30 days of execution.

5. After reviewing the petitions for reconsideration and related pleadings, we remain convinced that basic changes in our radio ownership rules are warranted, indeed essential, to ensure the continued availability of broad and diverse radio broadcast service to the public. We are unpersuaded by the suggestion of some petitioners that the fundamental changes in the radio marketplace that we documented in the *Report and Order* are either temporary or exaggerated and that no permanent regulatory response to them is therefore needed. After a thorough review of the record in this proceeding, however, we conclude that adopting more moderate increases in the national ownership rules and in the permissible level of station ownership in certain local markets at this time will provide necessary relief while enabling us to monitor marketplace developments as they unfold. We also conclude that expanding the new national ownership caps for group owners who invest in stations controlled by minorities or small businesses will further the goals of diversity and competition. In addition, we seek comment in a *Further Notice of Proposed Rule Making* on ways to encourage stations to adopt programs designed to increase pluralism in radio station ownership and stimulate investment in the radio industry. Such programs could achieve these goals by providing capital, technical and managerial assistance and training to small business entities.

6. Accordingly, as described in more detail below, we will amend our national ownership rule to permit a single entity to hold an attributable interest in up to 18 AM and 18 FM stations. After two years, that limit will increase to 20 AM and 20 FM stations. Further, we will permit an entity to hold a non-controlling attributable interest in an additional three stations in each service if the stations are controlled by minorities or small businesses.

7. We will amend our local ownership rules by eliminating the complex system of market tiers for markets with 15 or more stations. In those markets, a single entity will be allowed to own up to two AM and two FM stations, provided that the proposed combination does not lead to excessive concentration in the market. Excessive concentration will be presumed where the combined audience share of the stations to be jointly owned exceeds 25 percent. For markets with fewer than 15 stations, we will retain the rule adopted in the *Report and Order* that permits licensees to own up to three stations, no more than two of which may be in the same service, if the combination constitutes less than 50 percent of the stations in the market. We are also modifying the method of counting the number of stations in a market so that the number is counted with reference to overlapping principal community contours in all markets.

8. In addition, this *Memorandum Opinion and Order* rejects the request of a few petitioners that we revise our rules and policies regarding time brokerage arrangements between radio stations. We also clarify a number of issues in response to questions raised by petitioners and other interested parties.

II. NATIONAL OWNERSHIP RULES

A. Background

9. The *Report and Order* increased the national ownership limits to allow a single owner to own up to 30 AM stations and 30 FM stations. The previous limit had been 12 AM and 12 FM stations overall, with ownership in up to two more stations in each service permitted if those

[4] *Report and Order* at 2760-61.

stations were minority controlled. The Commission predicted that this expansion of the national limits would strengthen existing stations by allowing them to achieve economies of scale through combining administrative, sales, programming, promotion, production or other functions. The Commission found that, in view of the competitive realities of the industry, the likelihood of a single firm or group of firms exercising dominance or undue control over the radio industry through ownership of multiple radio stations at the national level is extremely remote. While competition and diversity are especially relevant at the local level, the Commission concluded that relaxation of the national caps may actually enhance the quality of viewpoint diversity, as economies of scale from group ownership provide additional resources to invest in programming.

B. Petitions/Comments

10. Several petitioners who agree that the 12/12 limits should be increased seek reconsideration of the Commission's decision to set the new limits at 30 AM and 30 FM stations. For example, John W. Barger suggests a limit of 24 FM and 30 AM stations.[5] The Cromwell Group and NAB support a 25-station limit per service with a 30-station limit for minority controlled entities.[6] With a limit of 25 rather than 30 stations, NAB argues, large group owners would still enjoy cost efficiencies but would be less likely to acquire stations in the very smallest markets. Sconnix Broadcasting contends that the 30/30 limits are reasonable in light of the 12-station television limit, but notes that it would support a reduction to 25 AM/25 FM.[7] Robert T. Wertime believes that the new rules should retain the general 30 AM/30 FM maximum, but preclude a single owner from acquiring more than 12 newly allotted AM and 12 newly allotted FM stations.[8]

11. Some petitioners are opposed to any increase in the national caps. LULAC, TRAC and UCC contend that nothing has changed since 1984 to justify increasing the limits and that the *Report and Order* exaggerated the financial problems of the radio industry. They reiterate their concern, raised in response to the *Notice* in this proceeding,[9] that raising the national ownership limits will threaten diversity of viewpoint. In arguing that the Commission need not increase its multiple ownership limits to resolve industry financial problems, LULAC contends that the same result can be achieved with a "failed station" waiver policy (*i.e.*, permit the combination when it is shown that one of the combining stations could not likely survive absent a waiver).[10] TRAC asserts that the Commission's action was based on "incomplete and often self-serving industry sponsored figures which overstate recession related short-term losses and obscure the fundamental health of the industry."[11] Even if the industry's numbers were correct, TRAC argues, the Commission incorrectly posits that radio's ability to serve the public interest is premised on economic viability, and does not have the data showing that stations are cutting news and public affairs programming.[12] UCC submits that the many station failures that have occurred despite the 12/12 decision cast doubt upon the efficacy of group ownership policy as a tool to afford economic relief to stations facing stiff marketplace competition. UCC also asserts that acquisitions above 12 stations should be contingent upon reinvestment in public service programming.[13] A number of petitioners contend that the higher national ownership limit will work against independent and minority broadcasters because they will be unable to compete with large groups. For example, LULAC contends that because minority owned stations tend to be low-rated and unprofitable, the new rules will drive minorities out of broadcast ownership. At the same time, LULAC argues, minorities not yet involved in broadcasting will be precluded from entering, both as owners and employees, because the new rules will increase station prices and will lead to discharge of existing employees.[14] NABOB argues that minority station owners have been unable to compete since the 12/12 rules were adopted because they cannot afford to acquire better facilities and because their competitors were becoming parts of large broadcast groups, thus improving their competitive position through economies of scale.[15] TRAC agrees, and contends that the Commission has not given the higher minority ownership limit sufficient time to work.[16] Several petitioners suggest that some type of higher ownership limit for minority owners be reinstated.[17]

C. Discussion

13. We remain convinced that the competitive realities of the radio industry, as detailed in the record in this proceeding and in the *Report and Order*, fully justify significant relaxation of the national ownership rule. Given the dramatic increase in the number of radio stations and the growth of competing media in recent years, we con-

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[5] John W. Barger Petition, Attachment at 3.

[6] Cromwell Group Petition at 1; NAB Petition at 20.

[7] Sconnix Broadcasting Petition at 4-7.

[8] Robert T. Wertime Petition at 3.

[9] *Notice of Proposed Rule Making* in MM Docket No. 91-140, 6 FCC Rcd 3275 (1991) (*Notice*).

[10] *Id.* at 1-6.

[11] TRAC Petition at 1. TRAC also argues that a recent U.S. Tax Court decision released after the *Report and Order* renders the profit and loss figures in the *Report and Order* inaccurate, as it increases the market value of radio stations up to 10 percent. *Id.* at 6-7 (citing *Jefferson-Pilot Corp. v. Commissioner of Internal Revenue*, 98 T. C. No. 32 (filed April 13, 1992) (permits broadcasters to amortize the value of their broadcast licenses)). Assuming that TRAC's characterization of this case is accurate, we do not believe this decision significantly affects our conclusion that the fortunes of radio stations have steadily declined.

[12] *Id.* at 5-6.

[13] UCC Petition at 1-4.

[14] LULAC Petition at 7-8, 20-23.

[15] NABOB Petition at 3-4.

[16] TRAC Petition at 15-17.

[17] *See, e.g.*, John W. Barger Petition, Attachment at 3 (limit should be 25 percent higher for minorities); Cromwell Group Petition at 1 (minority limit of additional five stations); NAB Petition at iii (minority limit of additional five stations); NHMC Petition at 3; TRAC Petition at 14 n.10. In addition, NAB asks that the Commission expand its tax certificate and distress sale policies. NAB Petition at 20-22. These matters are more appropriately addressed in other Commission proceedings. *See* Petition of The Coalition to Improve Tax Certificate Policies (dated June 23, 1992); Petition for Rule Making of the National Association for the Advancement of Colored People, the League of United Latin American Citizens, the National Hispanic Media Coalition and the National Black Media Coalition (filed Sept. 18, 1990).

tinue to believe that a substantial increase in the national radio ownership rules can be permitted without any threat to viewpoint diversity or competition in the broadcasting industry. Petitioners have failed to persuade us that our review of the record and our analysis of pertinent data were in error. The figures cited in the *Report and Order* illustrating the current state of the radio industry and analyzing the impact of relaxed radio ownership rules relied on a number of widely recognized industry and non-industry sources and, we believe, these figures are accurate.[18] Nor do we agree that our decision renders a radio station's economic vitality more important than the degree of service provided to the public; to the contrary, our decision underscores that radio stations cannot serve the public without adequate economic resources.[19] We thus decline to reinstate the former 12 AM/12 FM national ownership limits.

14. We are persuaded, however, that the new national limits should be changed in two respects. First, we are reducing to 18 AM and 18 FM the number of stations that a single entity may own or have an attributable interest in nationwide. After two years, the limit will increase to 20 AM and 20 FM stations. Second, as described below, an entity may have a non-controlling attributable interest in an additional three AM and three FM stations if those stations are controlled by minorities or small businesses.

15. While still affording radio broadcasters much-needed regulatory relief, adoption of this more cautious, phased-in approach will give us an opportunity to monitor marketplace developments and to make further adjustments in the rules if experience suggests that such adjustments would be desirable. The annual report assessing the effects of the revised rules on the radio industry to be prepared by our Mass Media Bureau will provide us with a means of analyzing changes in the market as they take place. At the same time, the rules adopted will enable the radio industry to begin strengthening its ability -- through more efficient operations and expanded resources -- to serve the public. Because the rules as amended will limit any single owner to owning less than one half of one percent of licensed radio stations, and because the radio industry as a whole is but a small portion of a much larger and highly competitive media marketplace, our concerns with promoting diversity and competition will be fully protected.

16. A second issue regarding the national ownership limits relates to those provisions of the former rules which allowed cognizable ownership of an additional two stations beyond the otherwise applicable limit if those two stations were minority controlled. The comments in the earlier phase of this proceeding observed that these provisions had not been effective in attracting investments from non-minority broadcast owners in minority controlled stations.[20] Citing this ineffectiveness, the *Report and Order* declined to include a minority ownership incentive in the new national ownership limits.

17. On reconsideration, several parties urge that their original comments should not have been read as a lack of support for a higher minority ownership limit and they argue that a minority ownership incentive should be retained in any amended rules.[21] In light of these comments, we have decided to revisit the issue of adopting ownership incentives in the national ownership rules. As stated in the *Report and Order*, we believe that "access to capital is the most critical limitation on minority participation in the industry."[22] We are now persuaded that minority controlled stations may gain such access to capital if group owners are permitted to exceed the national ownership caps where they take an attributable but non-controlling interest in such stations. In addition, because there may be other, non-minority individuals and entities that also face substantial difficulties securing financing to acquire radio stations, we will also allow group owners to exceed the national caps if they purchase attributable but non-controlling interests in stations controlled by a small business. Indeed, we note that earlier in this proceeding other parties emphasized that there is a problem for new entrants and small businesses generally -- not just minority-owned stations -- in entering the radio industry and that the core of the problem is the difficulty in acquiring the necessary capital.[23]

18. Accordingly, an owner that has acquired radio stations up to the national limit may hold a non-controlling attributable interest in an additional three stations per service if those stations are controlled by minorities or small businesses. By modifying the national ownership rules to include a higher minority/small business limit, we hope to encourage the entry of new minority and small business entities into broadcasting, as well as the expansion of existing minority and small broadcasting organizations. Like other group owners, a minority entity that has reached the overall national limit will not be permitted to own additional stations outright, but may take a non-controlling attributable interest in three stations per service that are controlled by other minority entities or small businesses. The minority ownership aspect of this provision is designed to help minority broadcasters increase their access to capital. We do not believe that minority

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[18] In this respect, TRAC claims that the data used by the Mass Media Bureau in its *Overview of the Radio Industry*, which was included in the record, overlook interest payments, excessive salaries and other factors that may affect profitability. TRAC Petition at 4, TRAC Reply at 6-9. We note that all staff analyses of profitability in the *Overview* were based on earnings before taxes and interest payments. In addition, TRAC provides no data to support its allegation regarding artificially inflated salaries. Even if TRAC's assertions are valid, the potential magnitude of such claims would not warrant a change in either our assessment of the state of the radio industry or the remedy we have adopted.

[19] As noted above, LULAC supports adoption of a "failed station" waiver policy that would permit a particular station combination only when it is demonstrated that one of the stations could not likely survive without the waiver. This "failed station" standard is insufficient to achieve the goals of this proceeding because it would focus on the health of a few individual stations rather than the vitality of the industry as a whole. Moreover, under such a standard, stations would virtually have to leave the air before they could receive assistance. We prefer a rule that would assist stations before they reach the point of failure.

[20] *See Report and Order* at 2769.

[21] *See, e.g.*, NABOB Petition at 9-10; TRAC Petition at 15-16.

[22] *Report and Order* at 2770.

[23] *See, e.g.*, CapCities/ABC Comments at 23-24; CBS Comments at 31 (in response to the *Notice of Proposed Rule Making* in this proceeding). We note that additional proposals to assist in securing access to capital are explored in *Notice of Proposed Rule Making and Notice of Inquiry* in Docket No. 92-51, 7 FCC Rcd 2654 (1992) (*Capital Formation Notice*).

station owners who have reached the overall national ownership limit have the same level of need for such assistance, but we encourage them to take advantage of the provision to invest in other minority controlled stations.

19. The "small business" definition used for purposes of allowing the acquisition of additional stations will apply to all small businesses which, at the time of application to the Commission, had total annual revenues of less than $500,000 and total assets of less than $1,000,000. We have chosen to use a purposely conservative definition until we have had some experience with applications under this provision and have had an opportunity to evaluate information from our Small Business Advisory Committee. The asset limit of $1.0 million is an additional safeguard to ensure that a traditionally wealthy business will not be permitted to take advantage of the cap merely because it had a low revenue year.[24] The annual revenues and assets of commonly-controlled businesses will be aggregated for purposes of this definition. Eligible entities will include both organizations and individuals that do not presently have any mass media interests as well as organizations or individuals owning several radio stations or other mass media outlets, as long as they do not exceed the revenue and asset limits. This small business exception will effectively include all entities that need assistance to gain entry or expand modest holdings in the radio industry.

D. Further Notice of Proposed Rule Making

20. In addition, we believe it is useful to explore alternative means of facilitating the introduction of minority owners, new entrants and small businesses generally into the broadcasting field. The actions taken in this proceeding in the *Report and Order* and in the present *Memorandum Opinion and Order* are intended to strengthen the radio service as a whole by allowing entities -- including small businesses -- to take advantage of certain efficiencies that may be associated with group ownership. In the absence of a firm economic base, however, neither service to the public nor diversity of ownership will be benefited. Moreover, we believe it would be desirable to encourage the entry of hitherto unrepresented or underrepresented owners into the radio industry. For example, in our *Capital Formation Notice*[25] we have sought comment on various proposals aimed at increasing the availability of capital for investment in the broadcasting industry.[26]

21. The evidence received up to now in this proceeding continues to leave some question as to how the national multiple ownership rules can best be used to provide investment incentives for small business and minority entrants into the radio industry. We believe that encouraging investment in small business and minority broadcasters is a goal worth pursuing. Minority broadcasters who have had difficulty acquiring the resources to become station owners could significantly benefit from such assistance. We believe, moreover, that a broader category of individuals and small business entities that likewise have had difficulty acquiring sufficient resources or expertise to become station owners could benefit from such a remedy.

22. We accordingly seek comment on a proposal that would permit a group owner to own or have a controlling interest in some number of stations beyond the otherwise applicable national limits if it establishes and successfully implements a broadcast ownership "incubator" program designed to ease entry barriers and provide assistance to small businesses or individuals seeking to enter the radio field. Such a program would work as follows. A group owner would be permitted to acquire an attributable interest (including a controlling interest) in stations above the otherwise applicable ownership limit upon a prior demonstration that it has in place a small business investment incentives program involving a meaningful and ongoing commitment to increasing pluralism in radio station ownership and stimulating investment in the radio industry. Such programs would be designed to aid small businesses, including in particular minority owned businesses, that have limited access to capital and limited broadcast business experience, and that have expressed an interest in station ownership.

23. The Commission could adopt a flexible policy as to what constitutes a qualifying incentives program. This would afford broadcast groups the maximum ability to use their knowledge of the industry and its financing to create programs designed to help overcome entry barriers that result from capital inadequacy, initial lack of credit availability, initial inadequacy of business planning expertise or other difficulties often associated with persons who have not previously been in the radio business. Group owners are in a particularly good position to create incubator programs that not only will help persons become radio licensees but, of equal importance, will also help them succeed in station ownership.[27]

24. Without attempting to limit additional creative mechanisms that may be developed, some general guidelines and examples of qualifying programs can be provided. For example, a group owner might create an SBA-like program which offers to eligible participants:

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[24] The asset limit chosen is twice as large as the corresponding revenue limit. While the ratio of assets to revenues varies widely across industries and individual companies, a ratio of 2:1 reflects the national average and appears to be representative of broadcast radio as well. *See Economic Report of the President*, February 1992, Table B-109 at 422, Table B-1 at 298 (indicates that Private Net Worth, less owner-occupied real estate and consumer durables, divided by Gross Domestic Product, equals approximately 2 during the period 1960-1990); *1989 Corporation Source Book of Statistics of Income*, Internal Revenue Service at 134 (indicates that the ratio of total assets to business receipts ranges from approximately 0.4 to 2.7 for the 8,000 radio and television broadcasting companies reported); *Standard and Poor's Corporation Records, Standard Corporation Descriptions*, 1992 (indicates that the ratio of total assets to sales for several radio companies ranges from 1.5 to 2.5).

[25] *Notice of Proposed Rule Making and Notice of Inquiry* in Docket No. 92-51, 7 FCC Rcd 2654 (1992).

[26] Indeed, a number of commenters in that proceeding have suggested ways to enhance the ability of minority entrepreneurs to raise capital. *See, e.g.*, National Association of Investment Companies Comments at 2 (relax attribution rules); Minority Broadcast Investment Corporation Comments at 6-7 (afford MESBICs passive institutional status and reduce their vulnerability to Commission's "sham" application and "accommodation letter" doctrines); NABOB Comments at 6 (expand tax certificate policy to assist buyers of stations that are not being sold for a profit).

[27] We note, for example, that broadcast owners already participate in NTIA's ComTrain program, which is designed to provide training assistance to new minority entrants in the broadcast field.

1. Management or technical assistance
2. Loan guarantees
3. Direct financial assistance through loans or equity investment
4. Training
5. Business planning assistance

Alternatively, a group owner could enter into a joint venture with an established Small Business or Minority Enterprise Small Business Investment Company (SBIC or MESBIC) to accomplish the intended objective. Working in conjunction with an established organization could increase the efficiency of the funding and development process.[28] We also might consider an administrative relationship between the stations' owners. Properly structured, such an arrangement might both provide a greater incentive for investment in the operations of hitherto untested owners as well as allow these owners to enjoy some of the administrative efficiencies associated with group ownership.

25. To ensure that such incubator programs are meaningful and effective, we contemplate granting increased ownership authority to applicants that have an established program and have experienced at least some success in its implementation. Additionally, we would propose that terminating the program or ceasing its implementation could result in the expanded ownership limit being withdrawn. We also seek comment on whether we should permit parties to seek additional ownership authority on the basis of incubator proposals that would be filed in advance with the Commission. Those proposals would be addressed on a case-by-case basis and would be approved if it appeared that the underlying objectives of assisting new entrants and small businesses to become radio station licensees would be achieved.

26. This proposal is intended to develop further incentives that will spur investment in the radio industry. In addressing this proposal, commenting parties are invited to suggest variants on the proposal or alternative means of accomplishing the same objective. Comment is invited, in particular, on: (1) the number of stations above the regular limit that might be obtainable through this process; (2) the nature of a program that might be approved, including the amount and types of financial assistance involved, particularly in relation to the financial size of the group owner involved, and the extent to which training and management and technical assistance should be a component of any program; (3) how such a program should be integrated with the "investment incentive" provisions of the rules already adopted; and (4) the best means of identifying and defining the beneficiaries of such a program.[29] The Commission will also ask its Small Business Advisory Committee to address this and alternative proposals in this area.

III. LOCAL OWNERSHIP RULES

A. Background

27. The *Report and Order* modified the Commission's local ownership rule, which had prohibited ownership of more than one AM station and one FM station licensed to the same principal city.[30] The Commission found that the increased fragmentation in the radio marketplace, the economic difficulties that many radio broadcasters are suffering, and the significant economies that can be realized from joint operation of same-market stations warranted relaxation of the local ownership rule to enable radio licensees to better compete in the marketplace.[31] Accordingly, the Commission adopted new local rules based on market size and audience share, as follows:

> For stations in markets with fewer than 15 radio stations, a single licensee will be permitted to own up to three stations, no more than two of which are in the same service, provided that the owned stations represent less than 50 percent of the stations in the market. Common ownership of one AM/FM combination will continue to be allowed in any event.
>
> For stations in markets with 15 to 29 radio stations, a single licensee will be permitted to own up to two AM stations and two FM stations, provided that the combined audience share of the stations does not exceed 25 percent.
>
> For stations in markets with 30 to 39 radio stations, a single licensee will be permitted to own up to three AM stations and two FM stations, provided that the combined audience share of the stations does not exceed 25 percent.
>
> For stations in markets with 40 or more radio stations, a single licensee will be permitted to own up to three AM stations and three FM Tstations, provided that the combined audience share of the stations does not exceed 25 percent.[32]

We indicated in the *Report and Order* that, for stations licensed to designated radio metro markets, we would count the number of stations in the market based on the

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[28] We stress that, under our proposal, incubator programs would have to involve a meaningful commitment to easing entry barriers to small businesses. Thus, we do not contemplate that simply writing a check to an SBIC or MESBIC, or holding a single symposium, would be sufficient to qualify as a *bona fide* incentives program.

[29] Parties wishing to address proposals of this type beyond the immediate area of radio ownership or that have alternative suggestions of broader coverage are invited to file such comments in our general video marketplace rulemaking proceeding, *Notice of Proposed Rule Making* in MM Docket No. 91-221, 7 FCC Rcd 4111 (1992), by October 30, 1992.

[30] The previous local radio ownership rule, or contour overlap rule, prohibited an individual or entity from owning two AM stations with overlapping 5 mV/m contours, or two FM stations with overlapping 3.16 mV/m contours. In addition, Commission rules require that the 5 mV/m contour of an AM station and the 3.16 mV/m contour of an FM station encompass the entire principal community to be served. 47 C.F.R. Sections 73.24(j), 73.315(a). These rules together prohibited ownership of two AM or two FM stations licensed to the same principal city.

[31] *Report and Order* at 2773-76.

[32] *Id.*

number of commercial radio stations meeting minimum audience survey reporting standards. For stations licensed to communities located outside the geographic boundaries of designated radio markets, we indicated that the number of stations in the market would be determined with reference to overlapping principal community contours. We also specified the manner in which the 25 percent audience cap would be applied, and limited simulcasting on same-service stations in the same market to 25 percent of either station's airtime.

28. These provisions, taken together, were intended to allow increased local multiple ownership, and consequent efficiencies, to the greatest extent possible consistent with the realities of particular markets, but with ample safeguards to insure that our core concerns with diversity and competition were addressed. For this reason, we adopted both audience share and numerical ownership limitations, and provided for generally stricter numerical caps in smaller markets. We stated that both types of safeguards were necessary, and indicated that the greater level of competitiveness of stations in larger markets, as measured by the number of competing commercial radio outlets, justified somewhat greater relaxation of the ownership rules in those markets. In specifying the details of our audience share limit and the manner in which we would count the number of stations in a market, we uniformly chose means designed to be conservative and as simple to apply as possible, given their stated purpose.

29. The petitioners for reconsideration raise a number of issues concerning the new local rules. We first address the specific numerical limits adopted. We then discuss how a market will be defined and how to count the number of stations in a market. Finally, we address the 25 percent audience share limit for larger markets and issues concerning the use of Arbitron or other audience share data in conjunction with the new local rules.

B. The Numerical Limits

1. Markets With 15 or More Stations

30. *Petitions/Comments.* A number of petitioners for reconsideration support a more modest expansion of the local ownership restrictions than we adopted in the *Report and Order*. For example, NAB suggests that a simplified 2 AM/2 FM limit in larger markets would provide broadcasters with much-needed flexibility but would be sufficiently restrictive to obviate the need for an audience reach cap and ameliorate the concerns of those who believe that the new local rules are overly permissive.[33] Similarly, Alliance Broadcasting, the Cromwell Group, Entertainment Communications and Sconnix Broadcasting advocate a 2 AM/2 FM limit.[34] Jacor Communications asserts that the local limits should not distinguish between AM and FM stations because both services have faced decreased revenues and increased competition.[35]

31. Other petitioners believe that the previous local rule, permitting only one AM and one FM station per community, should be reinstated. For example, Empire Broadcasting Corporation submits that service to the community results not so much from financial strength as from the civic involvement of owners and managers. Empire argues that it is unlikely that any locally owned stations can survive in a situation in which group owners are encouraged, through multiple ownership, to gain up to 25 percent of a given market's audience.[36] LULAC asserts that the Commission has justified relaxation of other multiple ownership rules (*e.g.*, elimination of regional concentration rule and raising the national limits from 7 to 12 stations) by explaining that local ownership rules will remain in place. %T [37] TRAC and UCC similarly argue that the new local rules will threaten competition and diversity, and UCC proposes reinstating the prior duopoly rules with waivers for failed stations.[38]

32. *Discussion.* In response to the near unanimity of opinion in the pleadings, we will revise our market tiers to reduce from the levels set forth in the *Report and Order* the maximum number of stations that may be commonly owned in the same local area. Specifically, the new local ownership rule will consist of two tiers. One tier will include those markets with 15 or more commercial radio stations. In those markets, a single entity will be permitted to own up to two AM and two FM stations, provided that the proposed combination will not lead to excessive concentration in the local market. As detailed *infra*, excessive concentration will be presumed where the combined audience share of those stations exceeds 25 percent. The other market tier, discussed below, will consist of markets with fewer than 15 stations. For those markets, we will retain the rules adopted in the *Report and Order* which permit a single entity to own up to three radio stations, no more than two of which may be in the same service, provided that the owner's stations represent less than 50 percent of the total number of stations in the market. We believe this reduction in the number of market tiers will simplify administration of the new rule and will simplify the showings required to demonstrate compliance. We also believe that this modification should assuage the concerns of those who believe that the new local rules are overly permissive.

33. This modification to our numerical limits, along with the revised market share limit, will afford owners flexibility and will allow them to achieve economies of scale flowing from greater combination of stations, but will reduce any potential for undue influence or control in a local radio market. We are mindful of the concern that a greater consolidation of stations in any market can affect the operations of the weakest stations in that market. Of course, to the extent that struggling stations choose to consolidate with other stations, they can benefit from these rule changes. We also note that the revised national ownership rule includes an investment incentive that will encourage large group station owners to invest in and otherwise aid licensees that are small businesses or are

[33] NAB Petition at iii-iv.
[34] Alliance Broadcasting Comments at 1-4; Cromwell Group Petition at 1; Entertainment Communications Comments at 3-4; Sconnix Petition at 9-11.
[35] Jacor Petition at 4-5.
[36] Empire Petition at 5-10.
[37] LULAC Petition at 15-18.
[38] TRAC Petition at 11-12; UCC Petition at 8-12.

minority controlled.[39] To the extent that a concern remains about the impact of our rule changes on some small stations, that concern is outweighed by the considerable public benefit we anticipate from a general strengthening of stations as a result of an increase in the local ownership limits. We stress, furthermore, that our annual review of the radio marketplace should provide guidance in measuring the impact of these rule changes on small stations and, indeed, on the entire industry.[40]

2. Markets With Fewer Than 15 Stations

34. *Petitions/Comments.* Some commenters suggest that our limits for markets with fewer than 15 stations are too restrictive. The Cromwell Group and Entertainment Communications propose a 2 AM/2 FM limit for small markets as well as large markets, and the Minnesota Broadcasts Association also suggests that large and small markets should be governed by the same standard.[41] NAB urges an increased small market limit of "50 percent or fewer" of all stations, rather than the limit of "less than 50 percent" adopted in the *Report and Order*.[42] NAB argues that the benefits of common ownership are most needed in small markets and cites the Commission's recognition in the *Report and Order* that the plight of small market stations is "particularly bleak."[43]

35. *Discussion.* We continue to believe that, with respect to our local ownership rule, one size does not fit all, and that a rule tailored to the circumstances of different sized markets is appropriate. Therefore, we reject proposals that we eliminate any differential between markets with fewer than 15 stations and markets with 15 or more stations. We believe that the different provisions adopted for large and small markets strike an appropriate balance, bearing in mind the relative wealth of large and small markets, the potential risks of ownership concentration in such markets, the costs of administering the rules and our overall regulatory goals. We also reject proposals that would liberalize the rules applied to small markets. We have recognized, and continue to recognize, that some small markets face particularly difficult financial problems.

36. Nonetheless, allowing additional concentration beyond that already permitted in these markets with the fewest number of stations has not been justified. A change to *up to* 50 percent of the stations in a market of fifteen or fewer stations, rather than the adopted limit of *less than* 50 percent, could result in an unwarranted level of consolidation in too many markets. For example, in a six-station market, a licensee could own three, rather than two, of the six stations. In a four-station market, a licensee could own two same service stations. Either situation presents too great a potential to dominate the local radio market.[44] In view of our continuing concern with diversity and competition, we do not believe it would be in the public interest to allow this level of consolidation in those markets with the fewest alternative voices. In addition, we reject Jacor's request that no distinction be drawn between AM and FM stations. While we will not specify the mix of AM and FM stations a single entity may own in these smaller markets, we believe that permitting a licensee to own three sameservice stations in a small market would be excessive.

3. Market Definition and Station Counts

37. *Petitions/Comments.* Several petitioners question using Arbitron data as a basis for geographic market definitions and station counts. They contend that Arbitron market definitions change regularly and, because the number of rated radio stations in designated Arbitron markets continually fluctuates, a radio station owner will have difficulty determining which local limit applies to its market. Accordingly, some petitioners suggest alternative methods to define the relevant market. For example, Adventure Communications and Cox Enterprises propose that the Commission define markets with reference to

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[39] Additional incentives are addressed in the *Further Notice of Proposed Rule Making* concerning the establishment of "incubator" programs. *See* Section II-D, *supra*.

[40] We note here that Entertainment Communications asks the Commission to indicate that group owners holding up to the maximum permitted number of AM and FM stations will not be subject to any greater diversification demerit in the context of a comparative renewal hearing. Entertainment Communications also asks that the Commission make clear that public interest programming that is co-produced, jointly broadcast or simulcast by two or more commonly owned radio stations in a market will be fully credited as to each such station for purposes of the station's renewal expectancy. Entertainment Communications Petition at 1-2; *accord* Cromwell Group Comments at 1. The ownership rules as amended herein reflect our considered policy judgment that a limited degree of common ownership of radio stations, both nationally and in local markets, will strengthen the radio broadcasting service as a whole and affirmatively serve the public interest in receiving improved radio service. The precise manner in which this policy judgment should be reflected in the comparative renewal context, however, is not a matter that is the subject of this proceeding.

In addition, we note that CapCities/ABC requests that the Commission extend the application of the top 25 markets/30 voices test (one-to-a-market waiver process) to television licensees who propose to acquire more than one radio station in a community in the same service. *See generally* CapCities/ABC Petition; *accord* Group W Comments, Winston Radio Corporation Comments. Possible revisions to the one-to-a-market prohibition, including the impact of revised radio ownership limits, are being addressed in the Commission's television ownership proceeding. *See Notice of Proposed Rule Making* in MM Docket No. 91-221, 7 FCC Rcd 4111, 4116-17 (1992). Until the issue is resolved, we will consider waiver requests using the case-by-case waiver approach, taking into account our general conclusions in this proceeding regarding the public interest in a strengthened radio service.

[41] Cromwell Group Petition at 1; Entertainment Communications Comments at 3-4; Minnesota Broadcasters Association Petition at 1-3.

[42] NAB Petition at 17-20; *accord* Voyager Communications V Comments at 2.

[43] NAB Petition at 17 (quoting *Report and Order* at 2760).

[44] To further clarify the application of the rule, we note that in a four-station market the rule would only allow an entity to own less than 50 percent of the stations in the market, or one station. Because the new rule was not intended to be more restrictive than the previous rule, however, an entity in a four-station market still may own an AM/FM combination. In markets with fewer than 15 stations where the "less than 50 percent" standard would permit ownership of three stations, an entity may not own three same service stations; pursuant to the new local rules, no more than two of those three stations may be in the same service.

Metropolitan Statistical Areas (MSAs) or other established geographic designations; for stations not in MSAs, the relevant market would be the county in which the station is located, the area within a fixed radius of a station's transmitter site or the area within a station's principal community contour.[45] Jacor Communications suggests that the Commission ignore Arbitron market designations and instead use a market definition along the lines of that adopted for non-designated markets, which is based on overlapping contours.[46] NAB similarly advocates a contour overlap approach.[47]

38. In addition, a number of petitioners argue that the method of counting stations set forth in the *Report and Order* tends to either overcount or undercount the number of competing stations in the market. Some petitioners object to the exclusion of non-commercial educational (NCE) "stations in determining the number of stations in the market.[48] These petitioners contend that because NCE stations contribute to diversity in the market, they should be considered when measuring the market power of a single owner. Petitioners similarly object to the Commission's failure to count stations not meeting Arbitron or other similar survey's minimum reporting standard.[49] Other petitioners contend that with respect to designated radio markets, station counts and audience share calculations should not include stations licensed to communities outside the market in question (*i.e.*, "below-the-line" stations, in Arbitron terms).[50] These petitioners submit that only stations actually licensed to a market should be counted for purposes of the local rules because strong stations from neighboring larger markets do not directly compete for listeners with other stations in the smaller market.

39. *Discussion.* Upon reconsideration, we conclude that the rules should be modified to change the manner in which we count stations for purposes of determining which market tier is applicable. This count will be made with reference to a contour overlap standard in all situations, not just for stations outside of Arbitron's designated radio markets. Specifically, we will define the radio market as that area encompassed by the principal community contours (*i.e.*, predicted or measured 5 mV/m for AM stations and predicted 3.16 mV/m for FM stations) of the mutually overlapping stations proposing to have common ownership. The number of stations in the market will be determined based on the principal community contours of all commercial stations whose principal community contours overlap or intersect the principal community contours of the commonly-owned and mutually overlapping stations.[51] We will include all operating commercial full-power stations, including daytimers and foreign stations, but exclude non-commercial stations, translators or stations not operational (*i.e.*, stations for which construction permits have been authorized but that are not yet on the air, or stations that have gone off the air and been silent for more than six months). While we agree that non-commercial stations represent an additional voice in terms of traditional diversity concerns, we note that these stations do not compete for commercial advertising and are generally not included in reported ratings surveys.

40. We believe that the use of this station counting method will address our core concerns of competition and diversity. We are convinced by petitioners' arguments that this revised measure will reflect the actual options available to listeners and will reflect market conditions facing the particular stations in question. Furthermore, by excluding unrated stations from our determination of market size, we would have failed to count stations that serve limited or specialized audiences. That method may have underestimated the full diversity of voices available to listeners in a given locality.

41. *Clarifications.* Mid-West Family Stations has raised a number of technical points concerning the new rules. First, Mid-West is concerned that the local rules adopted in the *Report and Order* were inadvertently worded so as to prohibit the types of AM/FM combinations permitted under our prior rules. We agree. Although the *Report and Order* made clear that AM/FM combinations would continue to be permitted, without limitation, in the smallest markets, the rule adopted appeared to apply contour overlap and market share limits to AM/FM combinations in markets with 15 or more stations. It was not our intent to adopt more restrictive ownership provisions. Therefore, we are making appropriate changes in the rule to clarify that we are imposing no new restrictions on combinations of one AM and one FM station.

42. Mid-West also raises a related point. It notes that, under the rules in effect prior to the *Report and Order*, the principal community contour of an AM station with a large service area could encompass or overlap the principal community contours of two or more commonly owned FM stations. This combination was permissible as long as the principal community contours of the FM stations did not overlap.[52] Mid-West notes that the audience share and numerical limits adopted in the *Report and Order* would appear to impose new limits on such combinations. As noted above, however, we did not intend in this proceeding to adopt more restrictive ownership provisions. Therefore, we are making appropriate changes to the rule to clarify that we are imposing no new restrictions on combinations that do not involve principal community contour overlap of stations in the same service.[53]

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[45] Adventure Communications Petition at 5; Cox Petition at 5-6.

[46] Jacor Petition at 2-4.

[47] NAB Petition at 6, 12-13, 16.

[48] *See, e.g.*, Cox Enterprises Petition at 8-9; Mid-West Family Stations Petition at 8; Minnesota Broadcasters Association Petition at 3-5; NAB Petition at 8-9; Sconnix Petition at 7-8; Robert T. Wertime Petition at 1-2.

[49] *See, e.g.*, Mid-West Family Stations Petition at 7-8; NAB Petition at 8-9.

[50] *See, e.g.*, Empire Broadcasting Petition at 12-14; Sconnix Petition at 11-12; *contra*, Mid-West Family Stations Petition at 7.

[51] For example, if Station A and Station B have overlapping principal community contours and Station A proposed to acquire Station B, the number of stations in the market includes not only Stations A and B, but also all commercial stations whose principal community contours overlap with those of Station A or Station B.

[52] Another example would be a Class C FM station with a principal community contour that overlaps the principal community contours of two or more relatively low power, non-overlapping AM stations.

[53] We note, however, that ownership combinations that do involve overlap of stations in the same service will, in markets with 15 or more stations, be subject to the audience share limit. Thus, for instance, where FM stations with overlapping contours are commonly owned, the acquisition of an AM station

43. Finally, Mid-West seeks guidance on how the Commission will analyze "chains" of commonly owned stations. Mid-West provides an example involving three FM stations – FM1, FM2 and FM3. The principal community contour of FM1 overlaps the principal community contour of FM2, and the principal community contour of FM2 overlaps the principal community contour of FM3, but the principal community contour of FM3 does not overlap the principal community contour of FM1. Mid-West notes that the rules adopted in the *Report and Order* might be construed to prevent common ownership of the three stations, even though each area of overlap involves only two stations. MidWest argues that such a construction could have the negative effect of deterring the formation of regional networks. We agree, and wish to clarify that for purposes of analyzing "chains" of commonly owned stations, *i.e.*, where three or more stations overlap but not all such stations are mutually overlapping, each area of overlap between stations in the same service will be considered separately. Thus, the ownership arrangement in question is not *per se* inconsistent with our rules. In Mid-West's example, we would count the number of stations in the market based on the number of stations whose principal community contours overlap the principal community contours of FM1 and FM2. If necessary, we would then determine whether the combined audience share for the commonly owned stations, FM1, FM2 and FM3, complies with the audience share cap in the metro market where FM1 and FM2's contours overlap or (in the absence of a metro market) in the counties that are, in whole or in part, within the area defined by the contours of FM1 and FM2. In the event the combination in the market relevant to FM1 and FM2 satisfies our rules, we would separately examine the FM2/FM3 combination, calculating the number of stations in the market and, if necessary, compliance with the audience share cap, based on the principal community contours of FM2 and FM3.[54] The rules reflect this approach.

C. The Audience Share Analysis

1. Preventing Excessive Local Concentration

44. *Petitions/Comments.* A number of parties ask that we delete any ownership limit based on audience share. These arguments are generally based on two interrelated but separate sets of concerns. First, there are substantive arguments suggesting either that a share limit is unnecessary or that audience shares are an inappropriate measure of concentration. Second, objections are raised, which are more practical in nature, as to costs and difficulties associated with obtaining and using audience share information from Arbitron in the manner specified by the rules. We address these concerns separately below.

45. With respect to the general issue of an audience share limit, NAB argues that the 25 percent audience share cap is so conservative that it will frustrate the Commission's desire to facilitate consolidation in the radio marketplace.[55] NAB and others generally object to the audience share limit on the grounds that there are better means of measuring the type of concentration that implicates the Commission's core concerns with diversity and competition. Some petitioners suggest that the Commission consider audience reach (potential audience) rather than audience share (actual audience),[56] or limit a single owner to a given percentage of the total number of stations in a market.[57] In this vein, NAB asserts that the Commission should be concerned with how many alternative voices are actually available to the local public and not whether, or to what extent, the public chooses to listen to a given voice.[58] NAB further claims that the audience share of commonly owned stations in a market bears little relationship to the owner's share of the local mass media advertising market, which is the relevant measurement of market power. NAB notes that many stations with high audience shares have poor demographic compositions resulting in a lower share of the advertising market, while other stations with lower audience shares enjoy disproportionately larger shares of the advertising market because of their favorable demographics.[59] In addition, some petitioners who support continuation of an audience share limit are concerned that the new local rules contain no mechanism for compelling divestiture if a group's audience share grows to exceed 25 percent sometime after acquisition.[60]

46. *Discussion.* In the *Report and Order*, we adopted an outright 25 percent audience share limit as a means to ensure against excessive concentration in local radio markets. We continue to believe that the Commission should focus on market concentration in addition to limiting the number of stations an entity may acquire in a market, in order to avoid adverse effects of any proposed station combination on local competition and diversity. However, in response to the various challenges made by petitioners to our use of a market share limit in general, we modify our approach to measuring concentration. As outlined below, applicants under the new ownership limits in markets with 15 or more stations will be required to submit an application exhibit demonstrating that the proposed acquisition will not result in excessive local concentration. *See* para. 55, *infra*.

47. We recognize that there are some limitations to relying exclusively on market share data to weigh concentration in the local radio marketplace, as pointed out

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with a principal community contour that overlaps the principal community contour of either FM station would require a showing that the audience share limit would not be exceeded in the relevant market or markets.

[54] We note that, given the same configuration of stations except that FM3 is an AM station, we would undertake a similar analysis. Specifically, we would examine the market relevant to the FM1/FM2 combination and the market relevant to the FM2/AM combination separately for compliance with audience share limits. Although this has the effect of applying the audience share limitation of an AM/FM combination, we do not believe this approach is any more restrictive than our prior rule. Our prior rule would not have allowed the same service (FM/FM) combination that triggers application of the audience share limit to the AM/FM combination.

[55] NAB Petition at 8.

[56] *See, e.g.*, John W. Barger Petition, Attachment at 4; Cox Petition at 9-10.

[57] *See, e.g.*, Jacor Petition at 2-4.

[58] NAB Petition at 8-9.

[59] *Id.* at 6-8.

[60] *See, e.g.*, Adventure Communications Petition at 8-9; Cox Enterprises Petition at 11-12; TRAC Petition at 11-12.

by petitioners. However, to the extent petitioners argue that ratings data are inherently unsuitable for purposes of analyzing local concentration, we disagree. We believe that audience share information will be useful in helping to measure diversity and competition. Specifically, audience share data can identify the most dominant stations in a market. And, compared to limits based solely on the number of stations involved, use of audience share is a means of accounting for the variety of types of stations -- clear channel, regional, daytime, low and high power -- that exist in various markets. Moreover, by continuing to consider this factor as part of our ownership limits, our rules may provide an incentive for stronger, successful stations to invest in other local stations with generally low audience shares -- an outcome that is consistent with the purposes of this proceeding. While our consideration of audience share, in the manner described below, may foreclose some acquisitions, our goal in this proceeding was not to foster consolidation as an end in itself but as a means of strengthening the radio industry's ability to serve the public interest.

48. We thus affirm our decision under the new ownership limits to evaluate showings of audience share in approving acquisitions in all but the smallest markets. We emphasize, however, that the Commission is concerned with preventing excessive concentration, not with freezing audience shares at a prescribed level.[61] In particular, as discussed below, we retain 25 percent as the audience share benchmark at which an acquisition will raise a *prima facie* concern that the transaction will lead to undue local concentration.[62] At the same time, we see no reason to alter our determination that divestiture should not be generally required where station combinations exceed an audience share of 25 percent after acquisition. We will also generally permit such stations to be assigned or transferred as a group.[63] Our elimination of the higher numerical limits for the largest markets minimizes any concern that such situations will lead to excessive concentration. Again, our goal is to promote robust competition, and we do not believe that penalizing enterprises that grow into stronger competitors is consistent with this objective.

49. To the extent petitioners express the view that ratings data are inherently unsuitable for purposes of setting multiple ownership limits, we disagree. Certainly, share data, unlike the relatively simple numerical limit in our prior rules, may change as market conditions change. Yet we believe this is a strength in our new rules, rather than a weakness. Fluctuations in market share are likely to have the greatest impact where a proposed acquisition would present high levels of audience share or market concentration. To the extent the rule provides an incentive for stronger, successful stations to invest in other local stations with commensurately low audience shares, we see no harm in such a result.

2. Use and Availability of Data to Determine Audience Share

50. *Petitions/Comments.* In addition to objecting to audience share limits as a general proposition, a number of petitioners specifically object to using data from Arbitron to determine the local "market share" of a group owner's stations.[64] They submit that Arbitron calculations are sometimes inaccurate and that the data are subject to manipulation.[65] Petitioners are also concerned that subscribing to Arbitron is costly and that the data are copyrighted and confidential. They contend that all parties to a transaction would be forced to become Arbitron subscribers just to determine if the transaction was even possible.[66] Moreover, petitioners contend that the audience survey requirement for non-Arbitron stations is expensive and burdensome.[67] Various concerns are also raised regarding fluctuations in the data from survey to survey. Because audience shares fluctuate, petitioners assert, a station owner will have difficulty determining whether a proposed combination would violate a 25 percent share limitation.[68] Petitioners thus believe that a share limitation may unduly complicate business planning.

51. *Discussion.* We continue to believe that widely-used audience survey data, while not exact, are a probative and accessible measure of market power relevant to the Commission's regulatory concerns. These surveys are based upon reporting by listeners unaffiliated with Commission licensees and are conducted by independent professional audience research firms. In addition, listener share data are widely available and provide information on a market-by-market basis. Thus, we continue to believe that audience share is best measured with reference to Arbitron or similar independent survey information.

52. However, we agree with petitioners that some changes in the rules can and should be made to address particular concerns with data availability and use. Petitioners have expressed serious concerns about the expense of

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[61] If the Commission's goal were to lock in audience shares at a given level, we would require divestiture whenever an entity's share grew to exceed 25 percent of the local audience. But as indicated *infra*, we are not requiring divestiture where an entity acquires stations and improves their market performance.

[62] The 25 percent audience figure will provide most broadcasters with a simple means of demonstrating that a proposed transaction will not foster excessive concentration. Proposed transactions that will result in a combined audience share of less than 25 percent will be deemed not to present a concentration problem.

[63] *See Report and Order* at 2783, n.109.

[64] *See, e.g.*, Adventure Communications Petition at 2-10; Cox Enterprises Petition at 2-13; Cromwell Group Petition at 1; Jacor Communications Petition at 2-4; Minnesota Broadcasters Association Petition at 3; NAB Petition at 6-17; Sconnix Petition at 7-8; Plum Creek Broadcasting Comments at 1-3; Tribune Comments at 2.

[65] *See, e.g.*, NAB Petition at 13-17; Adventure Communications Petition at 9. *See also* TRAC Petition at 13 & n.9 (Petitioner argues that unlike its television service, Arbitron surveys radio markets only when it has clients interested in a market; market definitions are changed with some frequency to suit clients' desires, rather than by actual demographic considerations). We note that Arbitron surveys all U.S. counties once a year and some designated markets more frequently.

[66] *See, e.g.*, NAB Petition at 10-13; Adventure Communications Petition at 5 n.5.

[67] *See, e.g.*, Adventure Communications Petition at 5-6; Cox Enterprises Petition at 6-7; Minnesota Broadcasters Association Petition at 2.

[68] *See, e.g.*, Cox Petition at 9-11; NAB Petition at 15; Alliance Comments at 5-6; Radio Operators Caucus Comments at 2.

subscribing to Arbitron[69] and about the possibility that Arbitron's data, which are copyrighted, may not be disclosed to the Commission.[70] We are also mindful of petitioners' concerns that Arbitron data are not accurate. While we recognize that the measurement tools used by Arbitron are subject to the statistical variances associated with any survey process and, indeed, may not in every instance involve a sufficient degree of accuracy to satisfy broadcasters anxious to present detailed information to advertisers, we do not believe that, for our purposes, a higher degree of accuracy is generally necessary. We have incorporated audience share into the new rules as a screening mechanism to identify potential problems with concentration. To the extent that petitioners are concerned that Arbitron's measuring tools may be too rough-hewn and thus may unfairly foreclose them from acquiring stations due to inaccuracies in the data, we note that applicants will be free to submit additional showings demonstrating compliance with the share limit based on more accurate survey methods or the alternative measures of market share described below.[71]

53. At the same time, in response to petitioners' concerns, we are modifying the rules and the process whereby we use audience survey data. First, as discussed above, we have generally adopted petitioners' suggestions to define and calculate numbers of stations in a market by using engineering data (station contours) rather than Arbitron or other survey information. We have also reduced the complexity of the rules by reducing from four to two the number of market tiers in which different rules apply. These changes should greatly reduce problems resulting from the use of audience survey based definitions. We will continue, with the exceptions described below, to calculate audience share based on metro market data where such data areNavailable. Although share information may not match precisely the market area definitions adopted for purposes of counting number of stations in a market, it should generally reflect the relevant competitive market involved. We will require the use of either audience data for the metro market if the contours of both stations at issue are mainly located within a single metro market, or audience data for the counties covered in whole or in part by the principal community contours of the stations at issue.[72] The relevant audience share figures in such cases will include audience statistics either for the metro market or from each county encompassed all or in part by the area covered by the principal community contours of the stations proposing to merge.[73] We recognize that disclosure of complete underlying survey reportsmay in some cir-

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[69] Arbitron does not generally disclose the precise charges for its regular services to specific clients. The cost to subscribe to Arbitron for any particular station within a designated market depends on the size of the market and the size of the station. Books that include state-wide county data, which should generally be sufficient for the showing required by our rules, appear to be generally affordable for most broadcasters. Although special studies tend to be somewhat more expensive, we do not believe special studies will generally be necessary under our revised rule. Moreover, as described below, we have provided an opportunity for applicants to submit alternative market share information in situations where Arbitron or equivalent data are unavailable or unduly expensive.

[70] We note, however, that the disclosure of Arbitron or other audience share data required to make the showing under our rule is limited, and in many instances is widely and reliably reported in trade and other publications.

[71] Where potential applicants are concerned that a single ratings period does not accurately measure audience share or that the Arbitron market is not the same as the market as defined by contour overlap, we have adopted a procedure to permit applicants to clarify their particular situations regarding audience share. For example, an applicant may explain in an application exhibit that a given ratings period is anomalous and that trend data (reflecting several ratings periods) are more accurate. *See* para. 55, *infra*.

However, to the extent some parties suggest that privately collected audience survey data are inherently inaccurate, arbitrary or subject to potential manipulation by private interests, we find nothing in the record to support these contentions. It is true, for example, that Arbitron market definitions change from time to time in response to the urging of specific Arbitron clients. These changes, however, do not appear to be frequent and we have no information suggesting that those changes that do take place are anything other than good faith efforts to properly reflect the actual changing nature of the markets involved. Because the data involved is used by competitors (broadcasters and other sellers of advertising time) and entities with other conflicting interests (both sellers and buyers of advertising time), a variety of private checks and balances exists to protect the integrity of the collection process. Arbitron's commercial self-interest in maintaining its reputation for integrity serves as a further safeguard against market definition and data manipulation. In addition, the data collected are used for advertising purposes and are thus subject to some governmental oversight that should help to prevent unwarranted or arbitrary manipulation. The Federal Trade Commission's "Guidelines Regarding Deceptive Claims of Broadcast Audience Coverage," (issued July 8, 1965), which were issued to help assist interested parties avoid possible violations of the Federal Trade Commission Act, specifically provides that claims based on survey data "should not be based on data obtained in a survey that the person (or firm) making the claim knows or has reason to know was not designed, conducted, and analyzed in accordance with accepted statistical principles and procedures, reasonably free from avoidable bias and based on a properly selected sample of adequate size." *See, e.g. Report and Order in Docket 20501*, 36 RR 2d 938, 41 Fed. Reg. 11556 (1976) (containing reprint of FTC guidelines).

[72] We note that this area may differ from the area covered by all stations counted in the market.

[73] If county data are used and if more than one county is required to encompass the entire area of the principal community contours of the stations, then the audience data for all counties involved shall be weighted based upon the populations of the counties and totalled to arrive at the the average audience share for applying the 25 percent guideline. For example, assume station A proposes to acquire station B and their principal community contours overlap in County #1. In addition, a portion of station A's principal community contour falls in County #2 and a portion of station B's contour covers Counties #2 and #3. Thus, the relevant data would show the audience shares of both stations A and B in Counties #1, #2 and #3.

Thus, we can calculate the combined audience share of Stations A and B assuming the following information:

Station A, County #1: Audience share 5, population 25,000

Station A, County #2: Audience share 10, population 25,000

cumstances raise questions as to the confidentiality of some of the data contained therein. Accordingly, we will not require that stations provide the complete underlying survey reports if they report and certify their combined shares and note the source of that information.[74]

54. Second, the rules adopted in the *Report and Order* required an audience share calculation based on the share among *rated* commercial stations rather than on the share of the entire local market audience.[75] This extra calculation now appears to us to add an unnecessary complication to the rules and make access to the relevant data more difficult without providing a necessarily more relevant or accurate measure and without any other significant countervailing regulatory benefit. We will amend the rules accordingly. This change will generally not make a major per-station rating difference and will allow parties to use widely reported data generally relied on for other industry purposes.

55. Third, we are revising the rules to permit parties to submit data that improves upon the accuracy of the regularly available metro market or county data or to make alternative showings where the applicant certifies that regular survey data are not readily available. In markets with 15 or more stations, the applicant will be required to demonstrate in an exhibit to its application for a proposed acquisition that the proposed combination will not result in an overly concentrated market. If audience share data for the market (*e.g.*, from Arbitron, another ratings service or other published source) are readily available, the applicant will be required to provide such information on the resulting market share in the exhibit. A demonstrated combined market share of 25 percent or more will raise a *prima facie* concern that the transaction will lead to excessive concentration.[76] A combination resulting in less than a 25 percent market share will not raise such concerns.[77]

56. While we believe that the audience research in general use by the industry provides a sound basis for action in the vast majority of cases, we acknowledge that there may be situations where applicants can provide data that eliminates statistical anomalies, provides a better focused survey area or includes revenue data or other information proving that excessive concentration will not result. Thus, for example, a special survey with a larger sample size could eliminate statistical anomalies. Survey data averaged over a number of survey periods may be appropriately qualified to be used as the practical equivalent of a more recent survey with a larger sample size. Audience data may be available, for example by the extraction of zip code area data, that eliminates anomalies resulting from unusual geographic features associated with the area served by the stations in question. We will thus not preclude applicants from relying on such alternative data. In all cases where applicants use special surveys, however, they must be conducted by an independent professional audience survey firm and applicants must submit, along with the survey, a description of the methodology used, including an estimate of the reliability of the survey.

57. In cases where the applicant certifies that market data are not readily available (*i.e.*, not in the applicant's possession, publicly available or obtainable without undue expense), we will also consider alternative demonstrations sufficient to assure us that no excessive concentration will result. While ratings data appear to be the most readily usable measure of a station's market share, we recognize that there may be alternative measures that demonstrate a lack of market power. It is not our intent to preclude proposed acquisitions simply because parties do not have reasonable access to one specific data source. Indeed, it would be anomalous to impose unduly high costs on those financially weak stations that the rule changes adopted are most likely to assist in better serving the public.

58. Thus, where applicants certify that they do not have readily available audience share data, they may substitute other information that can serve as a proxy for such data in an exhibit to their application. Alternative showings of the market share that will result from a proposed acquisition may include the stations' share of market advertising revenues or the market value of such stations relative to the other stations in that market. In addition, it may be possible to demonstrate with a high degree of certainty, based on the number of stations in the market and the nature of stations involved, that no public interest concern

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Station A, County #3: Audience share 0, population 50,000

Station B, County #1: Audience share 10, population 25,000

Station B, County #2: Audience share 5, population 25,000

Station B, County #3: Audience share 30, population 50,000

The total population in Counties #1, #2 and #3 equals 100,000. The percentage of the total population in the three counties residing in County #1 is 25 percent; in County #2, 25 percent; and in County #3, 50 percent.

In County #1, as a result of the proposed acquisition, one owner would have stations with a combined audience share of 15 (Station A's 5 share plus Station B's 10 share). Similarly, for the other counties, the total audience share of the proposed combination would be a 15 share in County #2 and a 30 share in County #3.

The weighted audience shares of Stations A and B for these Counties would be the sum of the product of each County's audience share times the County's share of the total population (*i.e.*, (15 x 0.25) + (15 x 0.25) + (30 x 0.50). In this example, the total would be 22.5, and the proposed combined audience share would thus not raise a concern.

[74] A false certification, like other false statements of fact made in FCC applications and pleadings, may constitute misrepresentation under our rules and policies. *See* 47 C.F.R. Section 73.1015.

[75] Typically, in the designated market reports, the shares of commercial stations in any given rating book add up to about 85 percent of the entire audience, with the other 15 percent being attributed to noncommercial stations and stations not meeting the minimum reporting standard.

[76] As we explain further below, for purposes of market share estimates, applicants may use either the counties in which the acquiring and acquired stations are located or the Arbitron market encompassed by both stations' contours.

[77] Where it is demonstrated that a proposed combination will result in less than a 25 percent market share and the application is otherwise acceptable, the staff will be authorized to grant the application without further consideration of the concentration issue.

associated with a high market share would exist. While it is clearly not adequate to simply recite data as to the number of local stations in operation, certain types of stations, for example daytime AM stations or relatively low power AM and FM stations, rarely have substantial audience shares in markets with a large number of stations. We will not insist on such stations expending significant sums of money to acquire audience data when it is clear in any case that the combination involved will not approach the share limit based on the nature of the facilities involved and the types of audiences received in comparable markets from which data is available. As is the case for audience share measurements, our evaluation of all alternative information will presume that a combination resulting in a market share of less than 25 percent will not lead to excessive concentration.[78] While we are providing applicants with some additional flexibility in terms of the specific nature of the data they may present (*i.e.*, either regularly available audience share data or an alternative showing), each applicant will bear the burden of proof in demonstrating that they have complied with the audience share threshold. Applications that do not include the necessary demonstration and that leave the Commission unable to evaluate compliance will be dismissed.[79]

D. Simulcasting

59. Apparent uncertainty emerges from some parties' pleadings regarding our rules governing the simulcasting of programming as a result of the increased ownership permitted within a market under our new local ownership limits. We will take this opportunity to clarify our simulcasting rules. Simulcasting remains unlimited for stations in different services. For stations in the same service whose principal community contours overlap such that the overlap area constitutes more than 50 percent of either station's principal community contour area, simulcasting may not exceed 25 percent of either station's daily broadcast time. These rules apply both to stations commonly owned and to those separately owned but time brokered. Our rules will be clarified where necessary.

IV. JOINT VENTURES

A. Background

60. In the *Report and Order*, the Commission declined to further restrict joint venture arrangements that do not involve "time brokerage," or joint programming arrangements. The Commission observed that these types of arrangements benefit the radio industry without threatening competition or diversity.[80] With respect to time brokerage agreements,[81] the Commission determined that the substantial relaxation of the local ownership rules in the *Report and Order* warranted some further restriction if the stations involved in a time brokerage arrangement are in the same local market. Accordingly, the Commission concluded that where an individual or entity owns or has an attributable interest in one or more stations in a market and time brokers any other station in that market for more than 15 percent of the brokered station's broadcast hours per week, the brokered station will be counted toward the brokering licensee's permissible ownership totals under the revised local and national ownership rules.[82] The *Report and Order* also prohibited licensees from duplicating more than 25 percent of their owned station's programming through brokered stations (or otherwise) where both stations are in the same service and serve substantially the same area.[83] Finally, the *Report and Order* required stations involved in time brokerage agreements to keep copies of all such agreements in their public inspection files and to file with the Commission a copy of any time brokerage arrangement which would result in the brokered station being counted in determining the brokering licensee's local and national ownership totals.[84]

B. Petitions/Comments

61. A few petitioners seek reconsideration of the Commission's decision regarding joint ventures. TRAC raises three points. First, TRAC asserts that the Commission must define what is meant by licensee "control" of its station. TRAC contends that, contrary to certain Commission staff decisions, a licensee's duty to retain control of its station involves more than retaining veto power over time brokered programming. U&T [85] TRAC also submits that anyone, even someone who could not be a station licensee, may program a6. broadcast station under the current rules.[86] Second, TRAC disagrees with the Commission's

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[78] We recognize that this alternative showing process will need to be refined on a case-by-case basis as the new rules are implemented. At the same time, we do not intend to create unnecessary obstacles to applicants who use this process as a result of the unavailability or cost of obtaining share data. Accordingly, while the staff is delegated authority to act on applications that are in full compliance with the revised ownership rules, applications that involve *bona fide* issues as to compliance with the 25 percent *prima facie* share limit and all cases involving alternative (nonArbitron) showings that cannot be clearly and unambiguously resolved, will only be acted on by the full Commission until clearly applicable precedents are established. Section 0.283 of the Commission's Rules (Mass Media Bureau delegations of authority) will be revised in a separate *Order*.

[79] *See United States v. Storer Broadcasting Company*, 351 U.S. 192, 202205 (1956) (application not in compliance with Commission rules may be dismissed without a hearing).

[80] *Id.* at 2787. The *Report and Order* reiterated that a licensee involved in a joint venture must retain control of its stations and must comply with the Communications Act, the Commission's Rules and policies and the antitrust laws. *Id.*

[81] The *Report and Order* defines time brokerage as "a type of joint venture that generally involves the sale by a licensee of 'discrete blocks of time to a "broker" who then supplies the programming to fill that time and sells the commercial spot announcements to support it.'" *Report and Order* at 2784 (citing *Policy Statement* in BC Docket No. 78-355, 82 FCC 2d 107, 107 n.2 (1980).*See also* 47 C.F.R. Section 73.3555(a)(3)(v).

[82] *Report and Order* at 2788-89.

[83] *Id.* at 2789.

[84] *Id.*

[85] TRAC Petition at 17-21 (citing *Joseph A. Belisle*, 5 FCC Rcd 7586 (Mass Media Bureau 1990); *J. Domenic Monahan*, 6 FCC Rcd 1867 (Mass Media Bureau 1990); *Peter C. O'Connell*, 6 FCC Rcd 1869 (Mass Media Bureau 1990)).

[86] *Id.* at 21.

decision to count only those programming arrangements that involve same-market stations. TRAC asserts that a station in a small market programmed by another station in a larger market will be able to offer advertising at greatly reduced rates, and that this situation will cause other stations in the smaller market to either go out of business or become extensions of other large market stations. TRAC is also concerned that stations programmed by stations from other markets will broadcast the news, weather and traffic of the distant city, which could have serious public safety implications in the local market.[87] Third, TRAC disputes the Commission's survey regarding the prevalence of time brokerage agreements as methodologically flawed and argues that as a result, the survey cannot "be the basis of reasoned decisionmaking."[88] In opposition to TRAC's petition, South Fork points out that all licensees are required to provide programming responsive to issues of concern to their communities, and that a station must render substantial service to the community to be assured a renewal expectancy.[89]

62. UCC argues that the *Report and Order* was not responsive to its questions regarding time brokerage. UCC asserts that the Commission must prohibit licensees from sharing the duty to assess community needs and problems and to provide issue-responsive programming. UCC also asserts that the Commission must establish standards for petitioners seeking to challenge a time brokerage agreement as a transfer of control, and standards for granting applicants renewal expectancies if their stations are brokered.[90] In addition, John W. Barger asserts that sales-only arrangements have the same, if not greater, potential for anti-competitive abuse as programming arrangements,[91] and Leventhal, Senter & Lerman contends that new time brokerage restrictions should not apply to television stations.[92]

C. Discussion

63. The petitioners have raised no new arguments to support reconsideration of the time brokerage restrictions adopted in the *Report and Order*. First, TRAC improperly seeks reconsideration here of staff decisions "issued two years ago. We believe that determinations regarding a licensee's retention of control of its time brokered station are most appropriately made on a case-by-case basis. This has been and will continue to be our practice in the time brokerage area. Further, the Commission has already responded to TRAC's concern that a non-licensee may broker a station, concluding in the *Report and Order* that "[w]e do not regard time brokerage agreements in which the broker has no cognizable ownership interest in any licensee in the brokered market as posing a significant threat to the integrity of our ownership rules or the diversity and competition principles upon which they are based."[93] Moreover, we emphasize that the licensee is ultimately responsible for all programming aired on its station, regardless of its source.

64. Similarly, TRAC raises no new arguments to rebut the Commission's conclusion that "[t]ime brokerage agreements involving stations licensed to different markets raise little public interest concern; indeed they can be difficult to distinguish from network affiliation agreements, of which the Commission has long approved."[94] The *Report and Order* reflects the Commission's concern that relaxation of the local rules, coupled with unrestricted time brokerage, might affect competition and diversity, which are primarily relevant at the local, as opposed to the national, level. This concern is not raised by different-market time brokerage arrangements. TRAC's fear that brokered stations will not air local news, weather and traffic in times of emergency is likewise unfounded. Not only are stations required to program in the public interest, convenience and necessity, but the Commission's Emergency Broadcast System rules may be invoked during various types of local weather emergencies and other disturbances.[95] We note South Fork's assertion that since entering an affiliation agreement, its station has doubled the amount of local public affairs programming it airs, increased the number of public service announcements it broadcasts and initiated local news reports. South Fork also submits that when necessary, it has preempted programming to provide information regarding local emergencies.[96] With respect to TRAC's concerns regarding the Commission's time brokerage survey, we note that the survey was not intended as a scientific poll, nor was it intended to be the exclusive basis of the Commission's decision. Our reference to the survey in a footnote in the *Report and Order* was intended only as an illustration that time brokerage apparently is not particularly widespread.[97] The specific questions raised by UCC imply that the Commission should treat time brokered stations differently from non-brokered stations in license renewal proceedings. We do not intend to penalize stations for engaging in time brokerage arrangements that are consistent with our new rules. Nor, however, do we intend to exempt brokered stations from the standards required of non-brokered stations. Accordingly, we reaffirm that brokered stations, like non-brokered stations, have the same responsibility to assess community needs and problems and provide issue-responsive programming as non-brokered stations. We also do not intend to differentiate between brokered and non-brokered stations in assessing renewal expectancy criteria. Similarly, petitioners seeking to challenge a time brokerage agreement as an unauthorized transfer of control should refer to the same standards applicable to any alleged unauthorized transfer of control.[98] In addition, we conclude that John W. Barger does not raise any new issues sufficient to warrant reconsideration of the Commission's decision not to further restrict joint sales ventures

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87 *Id.* at 21-22.
88 *Id.* at 22-23.
89 South Fork Opposition at 3.
90 UCC Petition at 14-15.
91 John W. Barger Petition, Appendix at 3, 4-5.
92 *See generally*, Leventhal, Senter & Lerman Petition; *accord*, NAB Opposition at 22; *contra* TRAC Opposition (re Leventhal, Senter & Lerman Petition and Osborn Comments) at 1-3.
93 *Report and Order* at 2789 n.129.
94 *Id.* at 2788 n.126.
95 *See* 47 C.F.R. Section 73.935(a).
96 South Fork Opposition at 3.
97 *See Report and Order* at 2788 n.127.
98 *See Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981).

among stations. The propriety of sales-only arrangements was upheld in the *Report and Order* and has been addressed in other Commission decisions.[99] In response to Leventhal, Senter & Lerman, we note that the revised time brokerage rules, including public inspection file and reporting requirements, were not intended to apply to time brokerage arrangements between television stations. Our rules will be revised accordingly.[100] This issue is currently being explored in the Commission's television ownership proceeding.[101]

66. *Clarifications.* In response to additional questions raised by petitioners and to informal inquiries received by Commission staff, we clarify the following points regarding time brokerage. First, apparently to facilitate a reduction in staff for brokered stations, NAB urges the Commission to reconsider the aspect of the Commission's main studio rule requiring the presence of at least one full-time managerial and one staff person at the main studio during regular business hours.[102] This issue is outside the scope of the current proceeding. Second, if two stations enter a time brokerage agreement in a market with 15 or more stations and their audience shares subsequently exceed 25 percent of the market, one station may not purchase the other, subject to the procedures described in Section III-C-2, *supra*. We do not consider engaging in time brokerage tantamount to transfer of control, so the two stations will be treated as separately owned regardless of the existing brokerage agreement. Third, while we will not interfere with parties' decisions regarding liquidated damages or the length of a brokerage agreement, we emphasize that licensees must retain control over their stations. If a licensee agrees to an excessive liquidated damages clause or to an unreasonably lengthy brokerage agreement, that licensee's control of its station may be questioned. Fourth, a station in one market may not enter into an attributable time brokerage agreement with a station in another market if the licensee is at the local ownership limit in that other market.[103] Fifth, licensees currently engaged in time brokerage will have one year from the effective date of these rules to modify their time brokerage agreements to account for both the 15 percent attribution restriction and the 25 percent limitation on same-service, same-market simulcasting. Agreements entered into prior to the effective date of the rules will be required to come into compliance with the simulcasting provisions one year following the effective date of the rules, but, with respect to the ownership rules, will be treated in the same manner as are station ownership acquisitions entered into prior to the rules (*i.e.*, termination of the agreement generally will not be required).

67. Finally, we clarify procedures for implementing the time brokerage reporting requirements adopted in the *Report and Order*. All time brokerage agreements between radio stations must be included in the public inspection files of both the brokering station and the brokered station. Confidential or proprietary information may be redacted where appropriate. These agreements must remain in the stations' public inspection files for the term of the time brokerage contract. Time brokerage agreements in existence on or before the effective date of these rules must be placed in the stations' public inspection files within 30 days of the effective date of these rules. In addition, the brokering station must report the existence of an attributable brokerage agreement on its ownership report (FCC Form 323, at Question 3).

68. A station that is brokering time on another station must also file, within 30 days of execution, a copy of any local time brokerage agreement that would result in the arrangement being counted in determining the brokering licensee's compliance with local and national multiple ownership rules. Such arrangements already in existence must be filed with the Commission within 30 days of the effective date of these rules. Filing of brokerage agreements with the Commission is primarily informational. However, in light of the modifications to the local rules adopted in this *Memorandum Opinion and Order*, this filing must include, as part of the certification already required, a verification that the arrangement complies with the ownership rules. In those situations where parties are unable to verify the relevant audience share data due to the absence of such information or for other reasons, those parties must first seek a ruling from the Commission, before implementing the time brokerage agreement, that the arrangement will not lead to excessive concentration in the market. Any request for such a ruling should contain the same detailed information regarding market concentration as would be included in an assignment or transfer application (see discussion above) and will be processed following the same procedures that are followed with an assignment or transfer application (*i.e.*, will be put on public notice and be made available for comment in accordance with the transfer or assignment pleading schedules).

V. CONCLUSION

69. The record in this proceeding is clear that the radio industry is in dire need of regulatory relief. It is also clear that, given the dramatic increase in the level of competition and diversity in the industry, measured relaxation of our ownership rules to permit radio owners to achieve greater economies of scale poses no threat to diversity and competition.

70. Nevertheless, in an abundance of caution, we have decided to reduce the national ownership limits we adopted in the *Report and Order* from 30 AM and 30 FM to 18

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[99] *See Report and Order* at 2787; *see also Second Report and Order* in MM Docket No. 83-842, 51 Fed. Reg. 11,914 (April 8, 1986); *Report and Order* in BC Docket No. 80-438, 87 FCC 2d 668 (1981).

[100] We will continue to require, however, that time brokerage agreements involving television stations be kept at the station and be made available for inspection upon request by the Commission. This requirement was inadvertently omitted from the rules attached to the *Report and Order* but has been restored in the rules attached to this *Memorandum Opinion and Order*. *See* Appendix C at 5 (Section 73.3613(e)).

[101] *See Notice of Proposed Rule Making* in MM Docket No. 91-221, 7 FCC Rcd 4111 (1992) (Television Ownership Proceeding).

[102] NAB Petition at 23; *accord* Entertainment Communications Comments at 5.

[103] For example, in Market X, Owner owns the maximum permissible number of stations under the local ownership rules. Owner owns another station in Market Y. Owner's Market Y station may not broker more than 15 percent of the time on a station in Market X owned by another licensee.

AM and 18 FM stations. After two years, the limits will increase to 20 AM and 20 FM stations. We will also permit owners to have a non-controlling attributable interest in up to three additional AM and three additional FM stations nationwide if those stations are controlled by minorities or small businesses. On the local level, we have reduced the maximum number of stations an entity may own in large markets from three AM and three FM stations to two AM and two FM stations. We have also modified our local rules to define the relevant market based on a contour overlap standard rather than a designated metro market standard, and we have modified the audience share aspect of our local rules to afford broadcasters more flexibility. These changes to the national and local radio ownership rules will provide significant relief to the troubled industry but will lessen potential disruption of the marketplace and will promote entry by minorities and small businesses. Finally, we decline to adopt more restrictive rules regarding time brokerage agreements between radio stations.

VI. ADMINISTRATIVE MATTERS

71. *Ex Parte Rules -- Non-Restricted Proceeding.* The *Further Notice of Proposed Rule Making* included herein is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

72. *Regulatory Flexibility Act.* Pursuant to the Regulatory Flexibility Act of 1980, a Final Regulatory Flexibility Analysis for the *Memorandum Opinion and Order* included herein is set forth in Appendix A. In addition, as required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in the *Further Notice of Proposed Rule Making* included herein. This IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Further Notice of Proposed Rule Making*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of the *Further Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601, *et seq.* (1980).

73. *Comment Dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on the *Further Notice of Proposed Rule Making* included herein on or before **October 30, 1992,** and reply comments on or before **November 15, 1992.** To file formally in this proceeding, you must file an original and four copies of all comments, reply comments and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

74. *Effective Date.* The rules adopted in the *Report and Order* in this proceeding, with the modifications included in this *Memorandum Opinion and Order*, will become effective on the date they are published in the Federal Register,[104] except for the requirements contained in paragraph 68 above relating to time brokerage rulings, which will become effective November 20, 1992, to allow sufficient time to apply for and receive approval from the Office of Management and Budget.[105]

75. *Additional Information.* For additional information regarding this proceeding, contact Jane Hinckley Halprin, Mass Media Bureau, (202) 632-7792.

VII. ORDERING CLAUSES

76. IT IS THEREFORE ORDERED that, pursuant to the authority contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(r), Part 73 of the Commission's Rules, 47 C.F.R. Part 73, IS AMENDED as set forth in Appendix C, below. The rules will become effective upon publication in the Federal Register.

77. IT IS FURTHER ORDERED that the stay of the rules adopted in the *Report and Order* (*See* 57 Fed. Reg. 35763 (August 11, 1992)) IS LIFTED as of the effective date of these rules.[106]

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[104] Because this action relieves a restriction, it will be made effective without 30 days' prior public notice.

[105] FCC Forms 301 (application for construction permit), 314 (application for consent to assignment) and 315 (application for consent to transfer) have been amended in accordance with the rules adopted in this proceeding. Until such time as printed copies of the revised forms are available, applicants proposing common ownership of overlapping stations may continue to use the prior form but shall attach a separate exhibit including the market and audience information necessary to demonstrate compliance with the revised ownership rules. This exhibit should include (as will the revised forms): (1) identification of the location and geographic coverage of the radio market involved; (2) the number of commercial AM and FM stations counted as being in the market, including contour maps that show those stations whose principal community service contours fall, in whole or in part, within the radio market; (3) for markets with 15 or more commercial radio stations, the basis and/or source material for the combined audience share figure, including the results and qualification of any commissioned audience survey or alternative showing used; and (4) the call letters and locations of all stations in the market that are, or are proposed to be, commonly owned, operated or controlled, including any AM or FM station in the market for which the applicant or any party to the application brokers more that 15 percent of the station's broadcast time per week.

[106] Appendix C includes all rules adopted in the *Report and Order* and the *Memorandum Opinion and Order* in this proceeding. This version of the amended rules therefore supercedes the version included in the *Report and Order*.

78. IT IS FURTHER ORDERED that the petitions for reconsideration filed in this proceeding ARE GRANTED to the extent indicated herein and are otherwise DENIED.[107]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Regulatory Flexibility

Final Regulatory Flexibility Analysis for Memorandum Opinion and Order

I. Need for and Purpose of this Action: This action is taken to relax the Commission's national and local ownership rules and to refine its policies regarding joint ventures. The Commission believes that this action will strengthen the radio industry.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis: None.

III. Significant Alternatives Considered and Rejected: First, in the *Report and Order* in this proceeding, the Commission adopted a 30 AM/30 FM numerical limit for radio ownership. The Commission concluded in this *Memorandum Opinion and Order* that a slight reduction in the limit would be effective in benefitting the radio industry and the listening public while also guarding against undue market dominance. Second, in the *Report and Order* in this proceeding, the Commission adopted a local ownership limit consisting of four market size tiers. The Commission concluded in this *Memorandum Opinion and Order* that a modification of the rule to allow for two tiers would be effective in benefitting the radio industry and the listening public while also guarding against undue market dominance. Finally, petitioners for reconsideration of the *Report and Order* in this proceeding urged the Commission to adopt more stringent restrictions on time brokerage arrangements between radio stations. The Commission declined to do so in this *Memorandum Opinion and Order*.

Initial Regulatory Flexibility Analysis for Further Notice of Proposed Rule Making

I. Reason for this Action: The *Further Notice of Proposed Rule Making* was adopted to explore ways to encourage investment in broadcasters that are small businesses.

II. Objective of this Action: The actions proposed in the *Further Notice of Proposed Rule Making* are intended to encourage entities to establish "incubator" programs designed to ease entry barriers and provide assistance to small businesses or individuals seeking to enter the radio industry.

III. Legal Basis: Authority for the actions proposed in the *Further Notice of Proposed Rule Making* may be found in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154 and 303.

IV. Reporting, Recordkeeping and Other Compliance Requirements Inherent in the Proposed Rule: None.

V. Federal Rules Which Overlap, Duplicate or Conflict With the Proposed Rule: None.

VI. Description, Potential Impact and Number of Small Entities Involved: Incubator programs would be specifically designed to aid small businesses, including in particular minority owned businesses, that have limited access to capital and limited business experience, and that have expressed an interest in station ownership. Approximately 11,000 existing radio broadcasters of all sizes may be affected by the proposals contained in the *Further Notice of Proposed Rule Making*.

VII. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent With Stated Objectives: All the proposals included in the *Further Notice of Proposed Rule Making* are aimed at assisting small entities gain entry into the radio industry.

APPENDIX B

Petitions for Reconsideration

1. Adventure Communications, Inc., Adventure Three, Inc., Booth American Company, Double L Broadcasting Limited Partnership, Double L Broadcasting of Lansing Limited Partnership, Evanston Broadcasting Co., Inc., Great Empire Broadcasting, Inc., KBIM Radio, Midcontinent Media, Inc., North East Kingdom Broadcasting, Inc., Paxson Enterprises, Inc., Prettyman Broadcasting, L.P., Stauffer Communications, Inc., WZPL, Inc.
2. Altoona Trans-Audio Corp.
3. Mr. John W. Barger
4. Capital Cities/ABC, Inc.
5. Cox Enterprises, Inc.
6. The Cromwell Group, Inc.
7. Empire Broadcasting Corporation
8. Entertainment Communications, Inc.
9. Jacor Communications, Inc.
10. League of United Latin American Citizens
11. Leventhal, Senter & Lerman
12. Mid-West Family Stations
13. Minnesota Broadcasters Association
14. National Association of Black Owned Broacasters, Inc., National Black Media Coalition, Inc.
15. National Association of Broadcasters
16. National Hispanic Media Coalition
17. Sconnix Broadcasting Company

[107] A list of petitioners and commenters is attached as Appendix B.

18. Telecommunications Research and Action Center, the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights and the National Association for the Advancement of Colored People

19. Office of Communication of the United Church of Christ

20. Mr. Robert T. Wertime

Comments on and Oppositions to Petitions for Reconsideration

1. Alliance Broadcasting, Inc.

2. Entertainment Communications, Inc.

3. Nashville Partners, L.P., Pittsburgh Partners, L.P., and KIXL Partners, L.P.

4. National Association of Broadcasters

5. National Telecommunications and Information Administration

6. Osborn Communications

7. Plum Creek Broadcasting Company

8. Radio Operators Caucus

9. South Fork Broadcasting Corporation

10. Telecommunications Research and Action Center and the Washington Area Citizens' Coalition Interested in Viewers' Constitutional Rights (2 pleadings)

11. Tribune Broadcasting Company

12. Voyager Communications V, Inc.

13. Westinghouse Broadcasting Company, Inc., Group W Radio, Inc. and Group W Television, Inc.

14. Winston Radio Corporation

Replies to Oppositions/Comments

1. Telecommunications Research and Action Center and the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights

2. League of United Latin American Citizens

Other Comments

1. Honorable Louise Williams Bishop

2. Anita Brower

3. Demaree Media, Inc.

4. Brenda Evans

5. KELD-AM/KAYZ-FM

6. KFIN Radio

7. KKIX-FM

8. KYKK Radio

9. WAMB-AM

10. WROW AM/FM

APPENDIX C
Rule Changes[108]

Part 73 of Title 47 of the U.S. Code of Federal Regulations is amended to read as follows:

1. The Authority Citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. §§ 154,303.

2. Section 73.3526 is amended by adding new paragraph (a)(12) and by revising paragraph (e) to read as follows:

§ 73.3526 Local public inspection file of commercial stations.

(a) * * *

(a)(12) For commercial radio stations, a copy of every agreement or contract involving time brokerage of the licensee's station or of another station by the licensee, with confidential or proprietary information redacted where appropriate.

* * * * *

(e)*Period of Retention.* The records specified in paragraph (a)(4) of this section shall be retained for periods specified in § 73.1940 (2 years). The manual specified in paragraph (a)(6) of this section shall be retained indefinitely. The letters specified in paragraph (a)(7) of this section shall be retained for the period specified in § 73.1202 (3 years). The "significant treatment of community issues" list and the records demonstrating the station's response to the educational and informational needs of children specified in paragraph (a)(8) of this section shall be retained by commercial broadcast television licensees for the term of license (5 years). Commercial AM and FM radio licensees shall retain the "significant treatment of community issues list" specified in paragraph (a)(9) of this section for the term of license (7 years). The certification specified in paragraph (a)(10) of this section shall be retained for the period specified in § 73.3580 (for as long as the application to which it refers). The records specified in paragraph (a)(12) of this section shall be retained as long as the contract or agreement is in force. The records specified in paragraphs (a)(1), (2), (3) and (5) of this section shall be retained as follows: * * *

[108] For the convenience of the reader, this Appendix incorporates all rules modified in the *Report and Order* in this proceeding and in this *Memorandum Opinion and Order*. Some rules included in this Appendix have been redesignated rather than modified, such as the television contour overlap rule, the one-to-a-market rule, the daily newspaper cross-ownership rule and the television national multiple ownership rule.

* * * * *

3. Section 73.3555 is amended by revising paragraphs (a), (b), (c), (d), (e) and notes 4, 5 and 7 to read as follows:

§ 73.3555 Multiple ownership.

(a)(1)*Radio Contour Overlap Rule.* No license for an AM or FM broadcasting station shall be granted to any party (including all parties under common control) if the grant of such license will result in overlap of the principal community contour of that station and the principal community contour of any other broadcasting station directly or indirectly owned, operated, or controlled by the same party, except that such license may be granted in connection with a transfer or assignment from an existing party with such interests, or in the following circumstances:

(i) In radio markets with 14 or fewer commercial radio stations, a party may own up to 3 commercial radio stations, no more than 2 of which are in the same service (AM or FM), provided that the owned stations, if other than a single AM and FM station combination, represent less than 50 percent of the stations in the market.

(ii) In radio markets with 15 or more commercial radio stations, a party may own up to 2 AM and 2 FM commercial stations, provided, however, that evidence that grant of any application will result in a combined audience share exceeding 25 percent will be considered *prima facie* inconsistent with the public interest.

Note: When evaluating audience share evidence submitted under Section 73.3555(a)(1)(ii), the Commission will consider data that eliminates statistical anomalies, provides a better focused survey area or includes revenue data or other relevant information. Where applicants certify that they do not have readily available audience share data, they may substitute other information that can serve as a proxy for such data. *See Memorandum Opinion and Order* in MM Docket No. 91-140, FCC 92-361 (released Sept. 4, 1992).

(iii) Overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.

(2)(i) Where the principal community contours of two radio stations overlap and a party (including all parties under common control) with an attributable ownership interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a) and (e). This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(ii) Every time brokerage agreement of the type described in subparagraph (a)(2)(i) above shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities, including specifically control over station finances, personnel and programming, and by the brokering station that the arrangement complies with the provisions of paragraphs (a)(1) and (e)(1) of this section.

(iii) Any party operating in conflict with the requirements of paragraph (a)(2)(ii) above on the effective date of this rule shall come into compliance within one year thereafter.

(3) For purposes of this paragraph:

(i) The "principal community contour" for AM stations is the predicted or measured 5 mV/m groundwave contour computed in accordance with §73.183 or §73.186 and for FM stations is the predicted 3.16 mV/m contour computed in accordance with §73.313.

(ii) The number of stations in a radio market, is the number of commercial stations whose principal community contours overlap, in whole or in part, with the principal community contours of the stations in question (i.e. the station for which an authorization is sought and any station in the same service that would be commonly owned whose principal community contour overlaps the principal community contour of that station). In addition, if the area of overlap between the stations in question is overlapped by the principal community contour of a commonly owned station or stations in a different service (AM or FM), the number of stations in the market includes stations whose principal community contours overlap the principal community contours of such commonly owned station or stations in a different service.

(iii) A station's "audience share" is the average number of persons age 12 or older on an average quarter hour basis, Monday-Sunday, 6 a.m.-midnight, who listen to the station, expressed as a percentage of the average number of persons listening to AM and FM stations in that radio metro market or a recognized equivalent, in which a majority of the overlap between the stations in question takes place. The "combined audience share" is the total audience share of all AM or FM stations that would be under common ownership or control following a proposed acquisition. In situations where no metro market or recognized equivalent exists, the relevant audience share data is the data for all counties that are within the principal community contours of the stations in question, in whole or in part.

(iv) "Time brokerage" is the sale by a licensee of discrete blocks of time to a "broker" that supplies the programming to fill that time and sells the commercial spot announcements in it.

(b) *Television Contour Overlap (Duopoly) Rule.* No license for a TV broadcast station shall be granted to any party (including all parties under common control) if the grant of such license will result in overlap of the Grade B contour of that station (computed in accordance with Section 73.684) and the Grade B contour of any other TV broadcast station directly or indirectly owned, operated or controlled by the same party.

(c) *One-to-a-market Ownership Rule.* No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls one or more such broadcast stations and the grant of such license will result in:

(1) The predicted or measured 2 mV/m groundwave contour of an existing or proposed AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community of license of an existing or proposed TV broadcast station(s) or the Grade A contour(s) of the TV broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the AM station; or

(2) The predicted 1 mV/m contour of an existing or proposed FM station, computed in accordance with § 73.313, encompassing the entire community of license of

an existing or proposed TV broadcast station(s) or the Grade A contour(s) of the TV broadcast station(s), computed in accordance with § 73.684, encompassing the entire community of license of the FM station.

(d) *Daily Newspaper Cross-Ownership Rule.* No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in:

(1) The predicted or measured 2 mV/m contour for an AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published; or

(2) The predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published; or

(3) The Grade A contour for a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(e)(1) *National Multiple Ownership Rule.* No license for a commercial AM, FM, or TV broadcast station shall be granted, transferred, or assigned to any party (including all parties under common control) if the grant, transfer, or assignment of such license would result in such party or any of its stockholders, partners, members, officers, or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in:

(i) more than 18 AM or more than 18 FM stations, or more than 20 AM or more than 20 FM stations two years after the effective date of this rule, provided, however, that an entity may have an attributable but noncontrolling interest in an additional 3 AM and 3 FM stations that are small business controlled or minority-controlled.

(ii) more than 14 television stations, or

(iii) more than 12 television stations that are not minority-controlled.

(2) No license for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in, either:

(i) TV stations which have an aggregate national audience reach exceeding thirty (30) percent, or

(ii) TV stations which have an aggregate national audience reach exceeding twenty-five (25) percent and which are not minority-controlled.

(3) For purposes of this paragraph:

(i) "National audience reach" means the total number of television households in the Arbitron Area of Dominant Influence (ADI) markets in which the relevant stations are located divided by the total national television households as measured by ADI data at the time of a grant, transfer or assignment of a license. For purposes of making this calculation, UHF television station shall be attributed with 50 percent of the television households in their television market. Where the relevant application forms require a showing with respect to audience reach and the application relates to an area where Arbitron ADI market data are unavailable, then the applicant shall make a showing as to the number of television households in its market. Upon such a showing, the Commission shall make a determination as to the appropriate audience reach to be attributed to the applicant.

(ii) "TV broadcast station" or "TV station" exclude stations which are primarily satellite operations.

(iii) "Minority-controlled" means more than 50 percent owned by one or more members of a minority group.

(iv) "Minority" means Black, Hispanic, American Indian, Alaska Native, Asian and Pacific Islander.

(v) "Small business" means an individual or business entity which, at the time of application to the Commission had, including all affiliated entities under common control, annual revenues of less than $500,000 and assets of less than $1,000,000.

* * * * *

Note 4: Paragraphs (a) through (e) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for increased power for Class C stations, to applications for assignment of license or transfer of control filed in accordance with § 73.3540 (f) or § 73.3541(b), or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy if no new or increased overlap would be created between commonly owned, operated or controlled broadcast stations in the same service and if no new encompassment of communities proscribed in paragraphs (c) and (d) of this section as to commonly owned, operated or controlled broadcast stations or daily newspapers would result. Said paragraphs will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap of contours of broadcast stations in the same service with each other no greater than already existing. (The resulting areas of overlap of contours of such broadcast stations with each other in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience or necessity.) Commonly owned, operated or controlled broadcast stations with overlapping contours or with community-encompassing contours prohibited by this section may not be assigned or transferred to a single person, group or entity, except as provided above in this note and by § 73.3555(a). If a commonly owned, operated or controlled broadcast station and daily newspaper fall within the encompassing proscription of this section, the station may not be assigned to a single person, group or entity if the newspaper is being simultaneously sold to such single person, group or entity.

Note 5: Paragraphs (a) through (e) of this section will not be applied to cases involving television stations that are "satellite" operations. * * *

* * * * *

Note 7: The Commission will entertain requests to waive the restrictions of paragraph (c) of this section on a case-by-case basis. * * *

4. Section 73.3556 is added to read as follows:

§ 73.3556 Duplication of programming on commonly owned or time brokered stations

(a) No commercial AM or FM radio station shall operate so as to devote more than 25 percent of the total hours in its average broadcast week to programs that duplicate those of any station in the same service (AM or FM) which is commonly owned or with which it has a time brokerage agreement if the principal community contours (predicted or measured 5 mV/m groundwave for AM stations and predicted 3.16 mV/m for FM stations) of the stations overlap and the overlap constitutes more than 50 percent of the total principal community contour service area of either station.

(b) For purposes of the section, duplication means the broadcasting of identical programs within any 24 hour period.

(c) Any party engaged in a time brokerage arrangement which conflicts with the requirements of paragraph (a) above on the effective date of this rule shall bring that arrangement into compliance within one year thereafter.

5. Section 73.3613 is amended by revising paragraph (d) and adding new paragraph (e) to read as follows:

§ 73.3613 Filing of contracts.

* * * * *

(d) Time brokerage agreements: Time brokerage agreements involving radio stations, where the licensee (including all parties under common control) is the brokering entity, there is a principal community contour (predicted or measured 5 mV/m groundwave for AM stations and predicted 3.16 mV/m for FM stations) overlap with the brokered station, and more than 15 percent of the time of the brokered station, on a weekly basis, is brokered by that licensee. Confidential or proprietary information may redacted where appropriate but such information shall be made available for inspection upon request by the FCC.

(e) The following contracts, agreements or understandings need not be filed but shall be kept at the station and made available for inspection upon request by the FCC: contracts relating to the sale of television broadcast time to "time brokers" for resale; subchannel leasing agreements for Subsidiary Communications Authorization operation; franchise/leasing agreements for operation of telecommunications services on the TV vertical blanking interval; time sales contracts with the same sponsor for 4 or more hours per day, except where the length of the events (such as athletic contests, musical programs and special events) broadcast pursuant to the contract is not under control of the station; and contracts with chief operators.

STATEMENT OF CHAIRMAN ALFRED C. SIKES
RE: RECONSIDERATION OF RADIO REPORT & ORDER

Today's radio ownership rules -- like those first concluded in March of this year -- will be beneficial for one central reason: The Commission abandoned the "one-size-fits-all" local ownership limits. There was then, and there is today, a recognition that attaining and sustaining economic and thus programming health might well require larger holdings in bigger markets than in smaller ones. This conclusion, and the resulting deregulation, are at the heart of our action to provide radio station owners with more freedom and listeners with better programming.

The large reduction in the total number of stations that any one entity can own nationwide is a simple function of the fact that we live in a city of shared power. We were asked by key members of Congress to reduce the limit and we did.

Finally, there has been some effort in this Report and Order to help aspiring broadcasters who lack the wherewithal to become station owners achieve that status. I welcome that effort. However, in most respects it is a continuation of one aspect of our earlier rules which has not worked.

The far more promising part of today's action, however, is the "incubator" initiative that we are putting out for further notice. In essence, we would allow group broadcasters to expand beyond the national ownership limits if they begin an "incubator" program to help those with modest means get a start in ownership and then nurture their development. This approach would use a significant market-based incentive (or what might be considered a "money equivalent") to boost station ownership.

I will look forward to the comments on this proposal. In particular, I am interested in whether an opportunity to exceed the national caps is likely to result in "incubator" programs and what kind of incentive or ownership cap increase would achieve optimal results.

STATEMENT OF COMMISSIONER ANDREW C. BARRETT

In Re: Revision of Radio Rules and Policies (MM Docket No. 91-140)

On April 10, 1992 I issued a statement dissenting in part and concurring in part to the newly adopted radio ownership rules.[109] I have never disagreed with the need to take action to help the economic plight of radio station owners. In fact, the proposal I submitted to my colleagues provided for substantial relaxation of the radio ownership rules. My disagreement with the majority was threefold. First, I felt the Commission's *Order* lacked record support for the changes adopted to the national and local ownership rules. Second, I voiced concern over the impact of the new rules on diversity and competition on the local, regional and national levels. Finally, I disagreed with the elimination of the incentives for increased minority ownership. I believed that at a time when minority ownership of radio stations appears to be at a level less than 2 percent, and declining, the Commission should be fostering greater participation by minorities, not less.

I made clear in my statement that I was ready to "discuss with my colleagues any reasonable, more cautious modifications to these rules."[110] Such discussions have occurred. I am pleased to be able to join with my colleagues in taking a more cautious approach to modifications of the radio ownership rules. Today's Order adopts a national ownership limit of 18 AM and 18 FM stations. The Order further provides incentives for increased minority ownership through the allowance of the ownership of three additional stations where these stations are minority-controlled.[111] In addition, I support the decision to add a small business incentive that will work along side the minority ownership incentive. Under this scheme a group owner has a choice of joint venturing with either an entity controlled by a minority or any entity that qualifies as a small business. I also support the decision to seek further comment on an "incubator" program, and to have the Commission's Small Business Advisory Committee examine this and other proposals in this area. A Further Notice on this issue will permit the Commission to gather comment on the most effective means to implement such a program. At the same time, licensees will be permitted to proceed with transactions involving the minority ownership or small business incentives while a record is developed on the incubator program.

I view the incubator program as an opportunity to move forward with additional methods to increase the participation of all segments of our diverse population. This incubator program is not a replacement for the minority incentive provision included in this decision.[112] But rather, it is an additional attempt to enhance the participation of small businesses into the broadcast industry.

With respect to the local rules, I believe the Commission's Order provides for a simpler approach. I had trepidations about the four tier system adopted in the Commission's *Report and Order* in this proceeding. The new rule allows licensees in markets with fifteen or more stations to buy one additional FM and one additional AM station, provided that there is no undue concentration of media control. In the smaller markets licensees have the flexibility to purchase up to three stations provided that no more than two are in the same service. In addition, the Commission is returning to its traditional contour overlap approach in counting the number of stations in a market. I also agree with the decision not to count noncommercial stations for purposes of this rule.

In conclusion, I believe that the Order we adopt today provides for a level of fundamental fairness and consideration of the impact on diversity and competition. It is a decision built upon compromise by all the Commissioners. It is a decision which I am pleased to support. Hopefully, the radio industry can move forward in a cautious manner toward achieving greater economies of scale and greater participation by diverse entities.

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In Re Revision of Radio Rules and Policies (MM Docket No. 91-140) ***Memorandum Opinion and Order on Reconsideration***

If the Commission's action last March to authorize ownership of up to 60 radio stations by one group owner seemed bold and heady stuff--- a rendezvous with destiny--- today's reconsideration will seem, by contrast, muted and modest: a rendezvous with reality.

I voted with the majority last spring to relax the ownership rules. The record and conditions in the market, in my judgment, amply supported liberalized limits. I viewed our action as possibly a tonic for an ailing industry.

Less than a month after that vote, I spoke to an American Bar Association group at the National Association of Broadcasters' annual convention.[113] I described why I believe that the deregulation of broadcasting, on balance, has advanced the public interest and should continue. I point-

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[109] *See Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755, 2808 (1992) (Statement of Commissioner Andrew C. Barrett, Dissenting in part and Concurring in part).

[110] *Id.* at 2822.

[111] I note that numerous parties who filed for reconsideration of our radio decision supported the retention of the minority ownership incentive. *See, e.g.*, Petition for Reconsideration filed by the National Association of Black Owned Broadcasters; Petition for Partial Reconsideration and Clarification filed by the National Association of Broadcasters; Petition for Reconsideration filed by the Office of Communications of the United Church of Christ; Petition for Reconsideration filed by League of United Latin American Citizens, Petition for Reconsideration filed by Telecommunications Research and Action Center, the Washington Area Coalition Interested in Viewers' Constitutional Rights and the National Association for the Advancement of Colored People; and Petition for Reconsideration filed by the National Hispanic Media Coalition.

[112] In addition, the Commission has other traditional policies favoring minority ownership of broadcast stations (i.e. the tax certificate, distress sale and comparative preference policies).

[113] "A Democrat Defends Deregulation," Remarks Before the 11th Annual ABA Forum on Communications Law, National Association of Broadcasters Convention (April 12, 1992).

ed out, however, that a decade of experience with broadcast deregulation should have taught us three sobering lessons:

o First, because the Commission can never fully predict the consequences of its actions, mistakes are possible.

o Second, overzealous, ideologically driven deregulation can deplete the Commission's scarce political capital and lead to confrontations with Congress that poison the atmosphere long after individual votes are over.

o Third, our regulation of broadcasting must reflect its special nature as a business "affected with the public interest."

Those lessons have forcibly come home to us in the intervening months. In my view, three events compel us to take today's action on reconsideration of the new ownership rules.

Urging Caution

First, broadcasters themselves expressed misgivings about the proposed new rules, warning of potentially severe unforeseen consequences. In late May the National Association of Broadcasters and other industry groups asked us to reconsider, and scale back, the rules. They suggested that more conservative national limits would better protect diversity and that a straightforward duopoly limit of 2 AMs and 2 FMs in larger markets would safeguard competition at the local level. The Commission thus found itself in the bizarre position of having advocated rules more generous than the radio industry itself seemed to want.

Second, minority broadcasters and several public interest groups argued forcefully against the Commission's abandonment of the minority-incentive features of the old rules. Many acknowledged that the old incentive had not worked as hoped to attract capital to minority ventures. But they strongly suggested that such incentives, which had been in place only seven years, *could* work, given time and encouragement. They deplored the loss of a policy that had symbolized the Commission's commitment to encouraging minority ownership, which previous Commissions, the Congress and the courts had identified as an important interest of government. Finally, they warned that unless such incentives were built into the Commission's ownership rules, minorities and small businesses could fall farther behind in their efforts to gain a foothold in the industry.

Finally, the Commission heard objections from a third important sector: the Congress. In May, Congressman John Dingell wrote to the Commission to express his own doubts about the impact of the new rules "on small operators who are a source of diverse programming in the marketplace." In June, Senator Ernest Hollings wrote a similar letter, observing that the Commission's March vote "seem[ed] certain to create unwanted levels of concentration of ownership, and a corresponding loss of diversity." In July, Senators John Danforth, Bob Packwood, Larry Pressler and Ted Stevens--- all Republicans generally supportive of deregulation--- asked the Commission to moderate the rules on reconsideration.

These expressions of Congressional unease built to a crescendo in late July. Just days before the rules were to take effect, the Commission learned that its March action was likely to be rolled back in legislation: an appropriations measure setting in statutory stone the old "12-12-12" ownership *status quo*. The Commission faced losing *any* chance to relax the ownership rules, despite its judgment that such a relaxation was fully justified.

Only rarely do our decisions come under such intense, widespread and relentless questioning. When that occurs, I believe that the Commission has a duty to reconsider--- even, as in this instance, when it can defend its actions as resting on a solid record and informed analysis.

Twin Goals

Given the questions raised so widely and persistently after the March vote, it seemed to me that the Commission should pursue two goals in its reconsideration of the radio rules: We must preserve some deregulation in hopes of reviving the sagging fortunes of the radio industry. Equally important, we should defuse the rising tension between the Commission and Capitol Hill by responding to the petitioners' substantive concerns that overzealous change might be unwise.

Today's action, in my judgment, serves these goals.

Those who see Congress as interfering, who believe that consultation and conciliation are timid acts, and that the Commission can be heedless of Congressional opinion may take a dim view of today's decision. For my part, I do not see Congress as an enemy; I believe that the Commission can and should balance full consultation on Capitol Hill with its deregulatory goals. Attention to Congressional concerns, after all, is grounded in tradition and law: The Supreme Court long ago concluded that "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953). When Congress reacts so strongly and negatively to our actions, we have a serious obligation to respond. To behave otherwise could amount to a dangerous brinksmanship whose consequences could only be harmful.

The rules we adopt today address the concerns of the affected parties, the Congress, and the Commission. Acts of prudent compromise never please everyone. This act of compromise, nevertheless, protects the Commission's goal of regulatory change, while allowing the Commission to move on to other matters--- free of rancorous objections from the Congress, and free of suspicion that we have somehow overreached.

Enterprise Zones

I support the new rules for another reason: They create, to use Commissioner Marshall's apt phrase, small business and minority radio "enterprise zones," designed to attract capital and the expertise of group owners to small and minority-owned stations. The Commission's efforts under the old rules to spur such investment were not very fruitful. Our new approach--- allowing group owners to acquire attributable interests in three additional stations if those stations are small businesses or minority-controlled---

offers a fresh opportunity, I believe, to strengthen broadcast diversity and to attract capital to stations that badly need it.

In a recent filing with the Securities and Exchange Commission, the National Association of Broadcasters starkly outlined the disappearance of capital from the broadcast marketplace:

* In 1989, at least 115 senior commercial banks were actively engaged in broadcast lending. Today, half of them no longer make broadcast loans.

* In 1989, $2.2 billion in new broadcast financing was issued. By 1991, that figure had shriveled to $191 million.[114]

Clearly, if capital to bolster the radio industry is to be found--- particularly capital for small and minority-owned ventures--- much of it will have to come from the industry itself. The investment incentives we create today are designed to give group owners a reason to plow some of their earnings back into stations that need help. These incentives are totally market-oriented and voluntary. They simply offer a regulatory benefit to those who freely choose to help a small business or minority owner. They reject harsh government intrusion into the marketplace. They are, in short, all carrot and no stick.

In addition, we unveil for further comment a number of other creative ideas, suggested by Chairman Sikes, to help develop additional capital and to improve management for small and minority broadcasters. While there are no guarantees of success, we hope to encourage a tide that will lift many boats.

A New Approach

I am convinced that the Commission today strikes an appropriate balance between prudent deregulation and fidelity to the public interest. The public suffers when the radio industry is in economic trouble, and we are altering our rules in the hope of alleviating those problems. What we do today gives radio licensees the relief they seek from the old rules and the certainty they need about the new ones. It also demonstrates that the lessons learned from a decade of deregulation have not been lost on today's Commissioners.

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[114] Comments of the National Association of Broadcasters before the Securities and Exchange Commission, *In the Matter of Small Business Initiatives*, File No. S7-4-92 at 1-2 (June 18, 1992). These comments were also filed in MM Docket No. 92-51 on July 13, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-38

In the Matter of

Amendment of Section 2.106 of	RM-7771 PP-29 PP-32
the Commission's Rules	RM-7773 PP-30 PP-33
to Allocate the 1610-1626.5 MHz	RM-7805 PP-31
and the 2483.5-2500 MHz Bands	RM-7806
for Use by the Mobile-Satellite	
Service, Including Non-geostationary	
Satellites.	

NOTICE OF PROPOSED RULE MAKING AND TENTATIVE DECISION

Adopted: August 5, 1992; Released: September 4, 1992

Comment Date: December 4, 1992
Reply Comment Date: January 6, 1993

By the Commission: Commissioner Barett issuing a statement.

INTRODUCTION

1. By this *Notice*, we propose to allocate the 1610-1626.5 and 2483.5-2500 MHz bands for the mobile-satellite service (MSS), including for non-geostationary satellite systems, such as those using low-Earth orbit (LEO) satellites. We also propose related allocations for the inter-satellite service above 20 GHz, principally to accommodate crosslinks that may be required by MSS systems. Such non-geostationary satellite systems are expected to offer a wide range of new and low-cost services, with a potentially worldwide scope, such as voice, facsimile and data messaging, and fleet surveillance and control.

2. These proposed allocations are consistent with decisions made at the 1992 World Administrative Radio Conference (WARC-92) that allocated these bands internationally. This action also responds to petitions for rule making filed by Constellation Communications, Inc. (Constellation), Ellipsat Corporation (Ellipsat), Loral Qualcomm Satellite Services, Inc. (Loral), Motorola Satellite Communications, Inc. (Motorola), TRW Inc. (TRW), American Mobile Satellite Corporation (AMSC) and CELSAT, Inc. (CELSAT). Finally, we tentatively conclude that the requests for pioneer's preference filed by Constellation, Ellipsat, Loral, Motorola, and TRW should be denied.

BACKGROUND

3. Currently the 1610-1626.5 and 2483.5-2500 MHz bands are allocated primarily to the radio determination satellite service (RDSS). More specifically, the 1610-1626.5 MHz band is allocated to RDSS for Earth-to-space transmissions and aeronautical radionavigation service, and a segment of this band (1610.6-1613.8 MHz) also is allocated to the radio astronomy service on a coprimary basis. The 2483.5-2500 MHz band is allocated to RDSS for space-to-Earth transmissions. Portions of this band also are allocated for industrial, scientific and medical applications; the broadcast auxiliary service; and certain private radio services.[1] At this time, there are no United States' RDSS systems operating in the 1610-1626.5 MHz and 2483.5-2500 MHz bands.

4. The possible operation of LEO-MSS systems was first brought before the Commission in requests for waiver contained in applications filed by Ellipsat and Motorola on November 11, 1990 and December 3, 1990, respectively.[2] The Commission addressed these requests for MSS LEO systems in its preparations for WARC-92.[3] In its *Report* on preparations for WARC-92, the Commission proposed to establish a primary allocation in the 1610-1626.5 MHz (Earth-to-space) and 2483.5-2500 MHz (space-to-Earth) bands for MSS and to allow the 1613.5-1626.5 MHz band to be used for MSS (space-to-Earth) on a secondary basis.[4] The Final Acts of WARC-92 allocated the 1610-1626.5 and 2483.5-2500 MHz bands to the mobile-satellite service. WARC-92 also adopted coordination caused to existing services in these bands.[5]

Non-geostationary Proposals

5. The five petitions for rule making seek to operate nongeostationary satellite communications systems using all, or portions of, the RDSS frequency band. The petitioners submit that there is need for additional voice and data services that could be best provided through LEO satellites. These parties generally claim that MSS LEO systems can provide many needed services, including position determination and reporting service, telephone, data and facsimile transmission, and fleet surveillance and control for the transportation and public service communities. Constellation, for example, states that its system will be able to provide real-time two way data collection, distribution and control for remote sensor networks.[6] Similarly,

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[1] *See* 47 C.F.R. Section 2.106.

[2] Ellipsat and Motorola initially filed requests for waiver to use these bands for voice and data transmission in addition to RDSS. Subsequently, petitions for rule making were filed by all of the above parties. We proceed by rule making because we expect that voice and data communications will be the major component of the services provided on these frequencies, and not merely ancillary to RDSS.

[3] *See*, for example, *Supplemental Notice of Inquiry*, GEN Docket 89-554, 6 FCC Rcd 1914 at paras. 21-23 (1991).

[4] *See Report*, GEN Docket No. 89-554, 6 FCC Rcd 3900 at paras. 50-57 (1991).

[5] *See* International Telecommunication Union, *Final Acts of the World Administrative Radio Conference* and *Addendum and Corrigendum to the Final Acts of the World Administrative Radio Conference* (WARC-92), Malaga-Torremolinos (1992). The coordination procedure established at WARC-92 is found under Resolution COM5/8. The international spectrum allocations are set forth in the "Addendum and Corrigendum" to the *Final Acts*, at pages 10-12 and 21-22. New technical criteria also were adopted, including e.i.r.p. limits affecting the 1610-1626.5 MHz band (see RR731X) and a power flux density coordination trigger for the 2483.5-2500 MHz band (see RR753X).

[6] *See* Constellation Petition at 2.

Motorola indicates that its system will be capable of providing to millions of users worldwide services such as position determination, paging, messaging, voice, facsimile, and data.[7] Ellipsat states that there are many areas, especially rural locations, that remain unserved by standard cellular service that MSS LEO systems could serve economically.[8] TRW submits that MSS LEO systems could provide both radiolocation and radionavigation services, as well as provide cellular-like services to customers located anywhere in the world.[9] According to the petitioners, these services could be provided in areas where such services are not practical using conventional terrestrial or satellite communications systems. The systems proposed in these petitions are described below.

6. *Ellipsat.* Ellipsat proposes to operate its satellite system, known as "Ellipso," in the 1610-1626.5 MHz and 2483.52500 MHz (RDSS) bands. This system would provide voice, data and radio determination services. Ellipsat initially plans to build, launch, and operate 6 LEO satellites, and eventually to increase capacity by expanding to a maximum of 24 satellites. It proposes to operate the satellites in an elliptical orbit 1,250 km above the Earth. Ellipsat claims that its use of elliptical orbits will optimize coverage of the United States with a minimum number of satellites. It plans to operate this system using code division multiple access (CDMA) digital spread spectrum techniques. Further, Ellipsat states that its system will permit a subscriber to use a cellular telephone to connect through either a standard cellular facility or its "Ellipso" satellite system. The cellular telephones employed by Ellipsat subscribers would use 800 MHz directly for standard cellular communications, and be converted automatically to 1.6 GHz to access the satellite system when a standard terrestrial cellular connection is not feasible.

7. *Loral.* Loral proposes an MSS LEO system it calls "GLOBALSTAR" that would operate in the RDSS band and provide voice, data, and radio determination satellite services. Loral proposes two alternative frequency use plans for its system. The first alternative (System A) would use only the RDSS uplink band (1610-1626.5 MHz) in a bi-directional manner; the other (System B) would use the 1610-1626.5 MHz band for user-to-satellite transmissions and the 2483.5-2500 MHz band for satellite-to-user transmissions. System A would employ time division duplexing (TDD) and CDMA access methods with beam hopping. System B would not use TDD or beam hopping. Loral proposes to launch 24 satellites initially and another 24 later to expand its capacity. These satellites would orbit at 1380 km above the Earth.

8. *TRW.* The proposed TRW satellite system is known as "Odyssey." TRW requests allocation of the 1610-1626.5 MHz and 2483.5-2500 MHz bands to provide MSS voice, data messaging, and radio determination satellite services. Its Odyssey system would employ 12 satellites, four each in three orbital planes, in a medium-Earth orbit at an altitude of 8,600 km. TRW states that the Odyssey system would be able to provide communications links between fixed and mobile users, or between pairs of mobile users, everywhere in the United States and eventually worldwide. The Odyssey system also would use CDMA.

9. *Constellation.* Constellation proposes a LEO satellite system that it calls "Aries." Constellation petitions the Commission to allocate the RDSS bands to provide MSS for voice, data, facsimile, and radio determination satellite service. The proposed Constellation satellite system consists of 48 satellites in an orbit of 845 km above the Earth, including 4 satellites in polar orbit. The Aries system would employ CDMA access techniques. Constellation requests that the Commission assign 2MHz to all qualified applicants and allow sharing of the RDSS uplink band on a non-exclusive basis;[10] establish operating criteria that will promote multiple entry in the RDSS bands; establish a frequency coordination committee; establish a means to assign additional spectrum to LEO licensees; and grant a license renewal expectancy to successful operators.

10. *Motorola.* The system proposed by Motorola is known as "Iridium." Motorola requests that the Commission allocate spectrum for bi-directional MSS transmissions in the RDSS uplink band (1610-1626.5 MHz). It proposes to provide voice, data, and radio determination satellite services. Motorola states that it may need only the 1616-1626.5 MHz segment of the RDSS uplink band for its MSS.[11] The proposed Iridium system would be comprised of 77 low-Earth orbit satellites, 765 km above the Earth, that would be capable of communicating with portable mobile units throughout the world. Each orbiting satellite would incorporate 37 multibeam cells that move with the satellites. The Iridium system would use both frequency division multiple access (FDMA) and time division multiple access (TDMA) methods. Motorola requests that the Commission permit use of FDMA and TDMA in the RDSS bands. It states that the Iridium system can effectively share the same spectrum with systems employing CDMA.

Geostationary Proposals

11. The Commission also received Petitions for Rule Making from AMSC and CELSAT requesting allocations of spectrum involving some or all of the RDSS bands for use by geostationary satellite systems. AMSC, the U.S. domestic MSS licensee in the 1545-1559 MHz and 1646.5-1660.5 MHz bands, requests that the Commission allocate the 1616-1626.5 MHz RDSS band, along with the 1515-1525 MHz band, for geostationary MSS and permanently assign these frequencies to AMSC.[12] AMSC seeks to use these bands to expand its planned mobile-satellite system.[13] AMSC states that it needs these additional frequencies because of problems in coordinating channels interna-

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[7] *See* Motorola Petition at 2.
[8] *See* Ellipsat Petition at 6.
[9] *See* TRW Petition at 6.
[10] This issue addresses licensing and service rules, and therefore will not be considered at this time.
[11] *See* Motorola Reply Comments to pioneer's preference requests, PP-28 through 33 April 23, 1992 at page 4.
[12] The 1515-1525 MHz band currently is allocated for aeronautical telemetering. AMSC submits that the 1515-1525 MHz band is better suited for its needs than the RDSS downlink band (2483.5-2500 MHz) due to the existing power flux density limits that prevail to protect existing users of the RDSS downlink band and the prevalence of microwave ovens and certain Industry, Scientific, and Medical (ISM) equipment operating on the same frequencies.
[13] *See Report and Order*, GEN Docket Nos. 84-1231, 84-1233, and 84-1234, 2 FCC Rcd 1825 (1986), *recon.*, 2 FCC Rcd 6830 (1987), and *further recon.*, GEN Docket No. 84-1234, 4 FCC Rcd 6029 (1989). The Commission allocated 27 MHz for the mobilesatellite service and awarded an authorization to con-

tionally for MSS. It submits that the many international systems attempting to coordinate the frequencies allocated for MSS GEO has resulted in a shortage of spectrum.

12. CELSAT asks that both the 1610-1626.5 MHz and 2483.52500 MHz RDSS bands be allocated for a new hybrid space and terrestrial personal communications service. CELSAT's proposed service would combine the mobile-satellite service provided through a satellite in geostationary orbit with new terrestrial cellular service to create a system of overlapping space and ground cells. CELSAT also suggests that the 2110-2129 MHz and 2410-2428 MHz bands would be acceptable as an alternative location for its hybrid system.

DISCUSSION

13. We tentatively believe the services to be provided by the proposed non-geostationary systems offer the promise of significant new benefits to both domestic and international communications users. The MSS LEO systems offer the flexibility of a universally available cellular-like telephone service for voice and data communications in addition to radiolocation and navigation service. Equally important, such systems could bring cellular-like telephone and data services to rural and other remote locations where such services currently are not available. As indicated in the petitions, LEO satellite systems also appear to offer significant economies of operation over geostationary systems for both systems operators and consumers. As noted by the petitioners, recent advances in both satellite and ground transceiver technology have made it possible to provide at low cost voice and data communications as well as RDSS in the existing RDSS bands. We therefore believe it important to make spectrum available for operation of MSS LEO services.

14. On the other hand, AMSC claims that it needs the RDSS bands for its planned geostationary MSS system because of difficulties in international coordination of its existing assigned frequencies. CELSAT, in its petition, states that it would use the RDSS bands for a hybrid geostationary satellite and terrestrial cellular-like system to provide voice, data and RDSS services similar to those that would be provided by the LEO systems.

15. We conclude that it would be in the public interest to establish new primary allocations at 1610-1626.5 MHz and 2483.52500 MHz for a mobile-satellite service. The petitions requesting access to this spectrum indicate that there is considerable interest in developing new services on these frequencies in addition to RDSS. As indicated by TRW, a "pure" RDSS system has not proven viable on these frequencies. Allocation of these bands for MSS use also would be consistent with the new international allocation on these frequencies for voice and high speed data established at WARC-92.[14]

16. Because of the important economic and service innovations that could be provided by both geostationary and non-geostationary MSS systems, we believe it important to provide an opportunity for these services to develop. Accordingly, we are proposing to allocate the 1610-1626.5 MHz and 2483.5-2500 MHz bands to the mobile-satellite service as adopted at WARC-92. This allocation will provide us with the maximum flexibility in considering the MSS proposals now before us.[15]

17. The petitions before us present requests for both geostationary and non-geostationary satellite systems. In considering the type of services to be authorized, we are aware that it may not be feasible for geostationary and nongeostationary systems to share the same frequencies. As indicated by the Association of American Railroads (AAR) and Constellation, sharing of the RDSS bands by LEO and geostationary systems may require severe limits on power and frequency that could render both systems unworkable. We note that the ITU CCIR is studying the potential for LEO and geostationary sharing in these bands. The Commission will be monitoring closely the efforts of the CCIR working groups that are studying this issue. We also encourage interested parties to participate in this process and to submit comments to the Commission on the issue of LEO/geostationary sharing.

18. The petitioners generally agree that the proposed 33 MHz of spectrum may not be sufficient to accommodate all of the MSS applicants at proposed levels of service. The actual number of operators that the available spectrum can support will depend on the volume of communications traffic handled by each operator and the degree to which the transmission technology or technologies used can support sharing. At present, we have very little information on the actual volume of communications that can be expected on the proposed MSS systems. Petitioners indicate that they expect traffic to increase substantially over time and that they expect to need additional spectrum in the future.

19. In a subsequent proceeding that address MSS service rules and licensing, we intend to consider whether it may be necessary to limit such operations to a specific type of access method in order to maximize sharing possibilities. As indicated above, TRW, Loral, Constellation,[16] and Ellipsat plan to implement LEO systems using CDMA spread spectrum, whereas Motorola plans to use both FDMA and TDMA access methods. We do not have sufficient information to evaluate the relative merits of the CDMA, TDMA, and FDMA access schemes proposed to be used by the MSS LEO systems with regard to sharing

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struct, launch, and operate an MSS satellite system to AMSC. *See Memorandum Opinion and Order and Authorization*, 4 FCC Rcd 6041 (1989).

[14] *See Final Acts of the World Administrative Radio Conference, supra.*

[15] AMSC has requested that 1515-1525 MHz be paired with 1616-1626.5 MHz. Accordingly, we are not proposing to allocate the 1515-1525 MHz band for MSS operations. We note that use of 1515-1525 MHz for MSS would result in interference to the existing aeronautical telemetering users in this band. In addition, use of this band for MSS would be inconsistent with a U.S. allocation footnote (RR722B) adopted at the WARC-92 conference. However, the WARC-92 did adopt a new allocation for the MSS in the 1525-1530 MHz band; we will address this extension of the existing MSS band in a separate proceeding. We note also that the system proposed by CELSAT would not conform to the WARC-92 allocation for the United States. In particular, the terrestrial component of its proposal is inconsistent with the international allocations. We therefore are dismissing CELSAT's request for use of the RDSS frequency band. As an alternative to the RDSS bands, CELSAT proposed that the 2120-2129 MHz and 2410-2428 MHz bands be allocated for its hybrid space and terrestrial mobile service. We intend to address this alternative request separately.

[16] Constellation's system uses both spread spectrum CDMA and FDMA access techniques.

or whether it is feasible to permit both CDMA and a combined TDMA/FDMA system to share the same spectrum. Accordingly, we solicit comment on the potential of each of the proposed access methods to support service by multiple LEO licensees in the new MSS bands since we tentatively conclude that the public interest is best served by multiple MSS LEO operators. We also solicit comment on the various access methods that are proposed, to the extent that these methods might affect the allocation of spectrum for MSS and as to how they might promote competition.

20. *Power Flux-Density Limits.* At the time the petitions for rule making were submitted, the international *Radio Regulations* subjected RDSS downlink transmissions in the 2483.5-2500 MHz band to the power flux-density limits specified in international *Radio Regulations* No. 2557.[17] The four LEO petitioners advocating use of CDMA propose that the flux-density limits for this band be relaxed by 10 dB. The petitioners submit that relaxation of this requirement is needed to facilitate an increase in system capacity. They contend that a 10 dB relaxation of the power flux density limits would not lead to harmful interference to existing terrestrial systems operating in this band.

21. In comments, National Academy of Sciences' Committee on Radio Frequencies (CORF) expresses concern that MSS LEO operations at 2483.5-2500 MHz pose a potential problem for the radio astronomy service (RAS) operations at the second harmonic frequencies of 4990-5000 MHz. It notes that the 4990-5000 MHz band is used extensively for space continuum studies.

CORF states that if MSS operators were to operate in the 2483.5-2500 MHz band pursuant to the current applicable international *Radio Regulations*, it may be possible to reduce interference to the 4990-5000 MHz band by employing adequate filtering in the satellite systems. CORF is opposed, however, to the petitioners' request for a relaxation of the power flux density limits.

22. Loral responds that it is in the process of completing a detailed analysis of the potential for a LEO satellite system to cause interference to the RAS operations. Loral claims that its early findings show that use of CDMA spread spectrum access methods can facilitate avoiding such interference. Loral requests that the issue of interference be resolved in the context of a rule making proceeding.

23. WARC-92 modified the application of power flux-density limits for the 2483.5-2500 MHz band and specified coordination requirements for MSS and RDSS operations in this band. The *Final Acts* specify[18] that the slightly less stringent power fluxdensity limits of international *Radio Regulation* No. 2566 would now be used as a trigger to determine when coordination is required by space stations of the mobile-satellite and radiodetermination-satellite services with respect to terrestrial services in the band. The Final Acts also provide that use of the 2483.5-2500 MHz band by the MSS and RDSS operations is subject to the application of the coordination and notification procedures set forth in Resolution COM5/8 for LEOs.[19]

24. We propose to require licensees operating in the 2483.52500 MHz band to comply with the power flux density limits adopted at WARC-92. That is, we propose to require use of the 2483.5-2500 MHz band by mobile-satellite and radiodetermination-satellite services to comply with the power flux-density limits of international *Radio Regulation* No. 2566. Use of these bands for MSS and RDSS systems would also be subject to the coordination and notification procedures set forth in Resolution COM5/8. Coordination of space stations of the mobile-satellite and radiodetermination-satellite services with respect to terrestrial services would be required if the power flux-density produced at the Earth's surface exceeds the limits in international *Radio Regulation* No. 2566. We further propose to subject use of the 1610-1626.5 MHz band by the mobile-satellite service (Earth-to-space) to the flux density limits and the coordination and notification procedures set forth in international Footnote 731X and in Resolution COM5/8. We seek comment on our proposal to adopt these WARC-92 power flux density limits and on the coordination procedures.[20]

25. *Feeder Links.* The LEO petitioners request spectrum for feeder links (satellite back-haul frequencies) to support their operations. TRW requests 220 MHz for feeder links, 110 MHz in each of the 19.7-20.2 GHz and 29.5-30.0 GHz bands. Loral recommends that the existing 5150.0-5216.0 MHz (downlink) and 6525.0-6541.5 MHz (uplink) RDSS feeder link bands be made available for MSS LEO feeder link operations. Ellipsat states that, for design simplicity, spectrum for feeder links should be provided in the RDSS bands. Ellipsat also states that it is willing to operate its feeder links in any band that the Commission might specify for MSS/RDSS operations. TRW objects to Ellipsat's proposal to use the RDSS bands for feeder links, arguing that use of the primary RDSS bands for feeder link operations would cause harmful interference to the TRW system and render its main operation in this band impractical.[21] Motorola states that it will require approxi-

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[17] *See* International *Radio Regulations*, RR Nos. 2557-2559.

[18] *See* Final Acts, WARC-92, *supra*, ADD 753X, (Addendum, and Corrigendum p21).

[19] *See* Final Acts, WARC-92, *supra*, Resolution COM5/8.

[20] The *Final Acts* further provide that use of the 16101626.5 MHz band for MSS and RDSS is subject to the coordination and notification procedures set forth in Resolution COM5/8. The *Final Acts* also specify emission limits for mobile Earth stations of either of these services in parts of the band used by systems that are aids to aeronautical navigation. Under these limits, mobile Earth stations of the mobile-satellite and radiodetermination satellite services in the 1610-1626.5 MHz band shall not produce an e.i.r.p. density in excess of -15 dBW/4 kHz in the part of the band used by systems operating in accordance with the provisions of international *Radio Regulation* No. 732, unless otherwise agreed by the affected administrations. In the part of the band where aids to aeronautical navigation are not operating in accordance with RR732, a value of -3 dBW/4 kHz is applicable. *See* International *Radio Regulations*, Footnote 731X; and *Final Acts*, *supra*, Resolution COM5/8.

[21] We note that Norris Satellite Communications, Inc. has filed a petition for rule making to allocate the 19.7-20.2 GHz and 29.5-30GHz bands for a general-satellite service that would include fixed, mobile, and broadcast. *See* RM-7511. WARC-92 upgraded the secondary mobile satellite allocation to co-primary for this band, but did not include broadcasting. We also note that Suite 12 has petitioned to amend Part 21 of our rules to permit point-to-multipoint distribution of video programming in the 27.5-29.5 GHz band. *See* RM-7872.

mately 200 MHz for intersatellite crosslinks and 100 MHz in each direction for gateway and satellite control links in the 18.8-20.2 GHz (downlink), 22.5-23.5 GHz (bi-directional), and 27.5-30 GHz (uplink) bands.

26. We decline to propose specific new allocations for feeder links for MSS LEO operations. We are not proposing to authorize use of the 5150.0-5216.0 MHz band for feeder link operations for MSS LEO or for mixed MSS LEO/RDSS systems because such use would not be compatible with the aeronautical radio navigation uses currently operating in this band. In the RDSS allocation we originally contemplated a very limited number of earth stations to support RDSS operations with few feeder link channels being required. However, now with MSS operations the numbers of earth stations is increasing and we anticipate problems with potential interference to the radionavigation service. We generally believe that the existing fixed-satellite bands provide sufficient capacity to serve the needs of MSS LEO feeder links. These fixedsatellite service allocations can be used for feeder links, subject to normal frequency coordination. We do note that international *Radio Regulation* No. 2613 was modified at WARC-92 to clarify that non-geostationary satellite operations are secondary to geostationary operations in the fixed-satellite service.[22] Since this would include feeder link operations, we seek comment on the effect this rule would have on the availability of frequencies in the fixed-satellite bands for MSS LEO feeder links. It should be noted that amendments to the license application regarding feeder links would be required.

27. WARC-92 made specific frequency allocations for the inter-satellite service. We propose including these allocations in our domestic table for crosslink communications (satellite-tosatellite communications): 24.45-24.65 GHz; 24.65-24.75 GHz; 25.25-25.5 GHz; 25.5-27 GHz; and, 27-27.5 GHz.

28. *Bi-directional Operations.* Motorola and Loral propose to use the 1610-1626.5 MHz band for both Earth-to-space and space-toEarth communications. Motorola argues that bi-directional use of this band will not result in harmful interference and that such use would free up the 2483.5-2500 MHz band for the operations of other potential services.

29. We have some concerns whether bi-directional use of this band is feasible, particularly with respect to interference that might be caused to existing radio astronomy services in the adjacent 1610.6-1613.8 MHz portion of the band.[23] We do note, however, that a secondary allocation to use the 1613.8-1626.5 MHz for MSS space-to-Earth transmissions would conform with decisions made at WARC-92.[24] We therefore are proposing a secondary MSS allocation for space-to-Earth operations in the 1613.8-1626.5 MHz band. This secondary allocation would permit, but not require, bi-directional use of the 1613.8-1626.5 MHz segment of the RDSS uplink band. We seek comment on the technical feasibility of space-to-Earth transmissions in the 1613.8-1626.5 MHz band, particularly as it could affect the radio astronomy service in the 1610.6-1613.8 MHz band.

30. *Other Matters.* The Commission, in its preparation for WARC-92, raised concerns about sharing MSS with the GLONASS system that is under consideration for use with the U.S. Global Position Satellite (GPS) for development of a Global Navigation Satellite System (GNSS) within the auspices of the International Civil Aviation Organization (ICAO). Similar concern is raised with regard to MSS LEO systems in the RDSS bands and the secondary allocation to MSS (space-to-Earth) in the 1613.8-1626.5 MHz band.[25] Comments on the impact of coordinating with the Glonass satellite system and potential sharing solutions are invited.

31. Further, we are concerned over the potential of hand-held devices to create radio frequency (RF) fields that may be harmful to human health. Although the power levels likely to be used by most of these devices should be relatively low, in some cases (e.g., handsets) their emissions could be in close proximity to users and non-users. Since 1985, the Commission has used the RF exposure guidelines of the American National Standards Institute (ANSI) for evaluating environmental exposure to RF fields.[26] The 1982 ANSI guidelines originally adopted by the Commission are being revised and likely will be considered for future use by the FCC along with other available exposure criteria.[27]

32. We invite comment on the likelihood of MSS LEO devices not complying with RF exposure guidelines that may be applicable to them. We also would like interested parties to submit for the record any documentation of research performed to date that is relevant to this issue. Other questions that have been raised are whether a digital signal biologically may be more hazardous than an analog signal at relatively low levels of exposure and whether the frequencies proposed for MSS LEO may be more hazardous than others. Also, are there suggested maximum levels for handsets above which excessive RF exposure might occur? Is the FCC the appropriate agency to establish such limits, or are there other agencies of the Federal Government that should take a lead role in developing such guidelines? For example, under the terms of the Radiation Control for Health and Safety Act of 1968, the U.S. Food Administration has jurisdiction to establish performance standards to control radiation from electronic products.[28]

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[22] *See* Final Acts, Article 29, *supra* p. 51.

[23] WARC-92 also elevated the existing radio astronomy allocation at 1610.6-1613.8 MHz from secondary to primary status. Consistent with the WARC-92 results, we have included the radio astronomy service as a primary allocation in this band in the proposed Table. We seek comment on this proposal.

[24] *See Final Acts, supra.*

[25] *See Second Notice of Inquiry*, GEN Docket No. 89-554, 5 FCC Rcd 6046 (1989), at paragraph 72. *See also Supplemental Notice of Inquiry*, GEN Docket No. 89-554, 6 FCC Rcd 1914 (1991), at note 25.

[26] *See* 47 C.F.R. § 1.1307(b).

[27] *See* IEEE C95.1-1991 (Revision of ANSI C95.1-1982), IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz (approved September 26, 1991). Copies available from: Institute of Electrical and Electronics Engineers, Inc. (IEEE), Standards Department, 445 Hoes Lane, P.O. Box 1331, Piscataway, NJ (088551331, 1-800-678-IEEE.

[28] *See* 21 C.F.R. Part 1010 - Performance Standards for Electronic Products: General; and Radiation Control for Health and Safety Act of 1968 (42 U.S.C. § 263f).

PIONEER'S PREFERENCE

33. The five petitioners proposing LEO use of this spectrum all have filed requests for pioneer's preference.[29] These filings include factual presentations seeking to justify the award of a preference. By this *Notice*, we are making an initial determination to not grant a pioneer's preference to any of the five proponents. After review of these requests and comment filed thereon, we tentatively conclude that none of the five proponents has demonstrated sufficiently that it merits award of a pioneer's preference. The various requests and their relative merits are summarized below.

34. *Constellation.* Constellation filed a request for pioneer's preference on February 20, 1992. Constellation also filed an experimental license application on June 3, 1991.[30] Constellation requests a pioneer's preference based on its efforts to develop new uses for the RDSS band and to bring new services to previously unserved areas and users. The Constellation proposal is for a nationwide service. It contends that its proposed satellite system will serve many areas and people that do not have access to any telecommunication service. Constellation argues its approach is innovative because it proposes 1) micro-satellites that are designed as an outgrowth of other satellites that Constellation has pioneered for the U.S. military; 2) a dynamic receiver; and 3) a new launch vehicle that will pave the way for the micro-satellite revolution and enable its satellites to be launched into orbit in a cost-efficient and reliable manner.

35. AMSC and Motorola oppose awarding a pioneer's preference to Constellation, arguing that the contribution of Constellation is not innovative and therefore not worthy of a preference. AMSC argues that Constellation refers to its innovative satellite and its dynamic receiver, but does not explain how these elements surpass existing technology. It contends that Constellation's alleged developments in launch vehicles is not within the class of innovation warranting a pioneer's preference based on the Commission's only award of a preference thus far.[31] Motorola argues that the Constellation request for pioneer's preference is very general and does not offer an explanation of what it is that legitimately can be characterized as new and innovative.

36. Based on the record, we tentatively conclude that Constellation's proposal merely combines existing technologies that it claims as a whole is an innovative achievement. Constellation has neither demonstrated that its micro-satellite and dynamic receiver are unique, nor provided any technical showing to demonstrate that its design surpasses the state of art in satellite communications technology. Thus, we tentatively conclude that Constellation has failed to meet its burden of demonstrating that its proposal is new or innovative. Accordingly, its request should be denied. Further, in our recent tentative grant of a pioneer's preference in ET Docket No. 91-280 we stated that launch vehicle developments are not the type of innovation of communications services that were contemplated for an award of a preference under the pioneer's preference rule.[32]

37. *Ellipsat.* Ellipsat asserts that its was the first application for a LEO system in the RDSS bands, filed on November 11, 1990. Ellipsat later filed a petition for rule making and a pioneer's preference request on July 29, 1991.[33] Ellipsat plans to operate nationwide mobile voice and position determination services via small low-Earth orbit satellites. As such, Ellipsat claims it was the pioneer of using the RDSS bands for this new and expanded communications service. Ellipsat further argues that its proposed satellite system would 1) be the first commercial use of elliptical orbits (designed to optimize coverage over the United States); 2) use CDMA spread spectrum techniques (to provide efficient use of the spectrum and enable the sharing, or co-use, of allocated spectrum); 3) utilize transparent interconnections between ground and satellite (results in seamless communications), and 4) provide low cost high quality voice service. Ellipsat asserts that its system combines state-of-the-art technology in a highly innovative and spectrum efficient fashion to bring both position determination and concurrent voice services to the public. It contends that the use of small satellites, low-Earth orbit, and a minimum ground segment ensures

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[29] Pioneer's preference is intended to ensure that innovators of new communications services or technologies have an opportunity to participate in providing services that utilize the innovations that they have developed. Under the Commission's rules, an applicant awarded a pioneer's preference is entitled to have its application considered without being subject to competing applications. Pioneer's preferences are awarded to parties that demonstrate that they have developed an innovative proposal that leads to the establishment of a communications service not currently provided or a substantial enhancement to an existing service. The Commission does not routinely grant pioneer's preferences. *See* 47 C.F.R. Sections 1.402, 1.403, and 5.207.

[30] Constellation's request for experimental authority is to construct, launch and operate two prototype LEO satellites, and associated gateway and mobile earth stations. Constellation plans to demonstrate its design and construction techniques, verification of spacecraft mating interfaces and launch system performance, development of doppler correction techniques, development of inter-satellite hand-off techniques, verification of power management techniques and communications protocols, and development of operational techniques to minimize temporary path blockages. Constellation was granted an experimental license in the 1.6, 2.5, 19.7-20.2, and 29.5-30.0 GHz bands on August 5, 1992.

[31] *See Tentative Decision*, ET Docket No. 91-280, 7 FCC 1625 (1992).

[32] *Id.*

[33] Its initial proposal was filed as a request for waiver of Section 2.106 of the Commission's Rules, *see* para. 4, *supra*. Ellipsat also filed an experimental license application on July 30, 1991. In its experimental request, Ellipsat proposes a four phase test program. Phase 1 consists of simulation tests with no external RF radiation. Phase 2 includes ground transmission field tests to characterize signal fading, test methods for signal level control of its mobile units, and confirm its approach for position determination. Phase 3 is the initial in-orbit experiment which consists of the launch and operation of two satellites, in two separate orbits, to determine doppler correction and position determination techniques, to confirm results obtained in Phase 2 and to determine satellite degradation effects. Phase 4 involves the launch of five additional satellites into the preferred orbit determined in Phase 3 to demonstrate the launch sequence from a single launch vehicle, test mobile unit hand-offs to satellites, and develop techniques for minimizing call interruption. Ellipsat was granted an experimental license for four satellites in the 1.6 and 2.5 GHz bands on August 5, 1992.

rapid implementation and lower costs to the public. Ellipsat argues that the mobile voice services will provide an economic base for the RDSS service, and will complement terrestrial cellular telephone services by providing those services to currently unserved rural areas as well as to current and future cellular subscribers who roam beyond their coverage areas.

38. Motorola and AMSC oppose the Ellipsat request for pioneer's preference. AMSC argues that the Ellipsat proposed system is not innovative. AMSC points out that Ellipsat in its pleadings admits that its system uses existing technology and maintains that Ellipsat was not the first entity to use elliptical orbits. Motorola contends that although Ellipsat approached the Commission with its LEO proposal before Motorola, Motorola made public presentations of its system beginning in June, 1990, before Ellipsat filed its application.

39. We tentatively conclude that Ellipsat has failed to meet its burden of demonstrating that its proposal is new and innovative, and therefore that its request should be denied. We observe that the various techniques utilized by Ellipsat already exist in the satellite community and do not demonstrate an innovative contribution on the part of Ellipsat. For example, Elliptical orbits have been used by U.S. military satellites and by the Russian Molnyia satellite system.[34] Further, Ellipsat has not demonstrated that it has pioneered the use of transparent interconnections between ground and satellite systems.

40. We also note that there does not appear to be any significant timing differences in the application process to indicate that one or more of the applicants had a long lead over the others in activities such as concept design and verifiable, relevant experiments. Accordingly, we conclude that in this instance it would be inappropriate to single out any applicant or applicants based on the timing of formal submissions to the Commission.

41. *Loral.* On November 4, 1991, Loral submitted a pioneer's preference request stating that it could provide a new service that will enhance the existing radio determination satellite service. Loral claims that it has developed a LEO-MSS satellite system that can use the spectrum already allocated for RDSS to provide data and voice transmission to hand-held and other mobile or portable transceivers along with RDSS position determination services. Loral argues that its proposal to implement a lowEarth orbit satellite system reflects substantial innovation in the areas of system architecture (provides multiple user benefits and inter-operability with the existing public telephone switched network); satellite and system design (use of eight satellites per circular orbital plane, spot beams, smooth call hand-off, pilot channel for synchronization with gateway stations, multi-frequency and multibeam antennas); spread spectrum CDMA (developed and patented by Qualcomm); and high system capacity (accommodates thousands of voice and data users simultaneously). It claims that these developments meet the Commission's criteria for the award of a pioneer's preference. Loral also seeks authority for a nationwide LEO satellite system.

42. AMSC and Motorola oppose the Loral request on the basis that Loral has not demonstrated an innovative new service. AMSC maintains that Loral fails to demonstrate how its proposed LEO satellite system is innovative. In fact, AMSC contends that the reasons provided by Loral have already been found by the Commission to be of the type that is not new and innovative communications technology. Motorola asserts that the Loral claims of innovativeness appear to be derived from the other pioneer's preference applications. Motorola states that it suggested bidirectional operations before Loral. It also argues that Loral's claim of a preference based on its spread spectrum design should not be considered because spread spectrum is not new or innovative with regard to existing communications technology.

43. Based on the record, we tentatively conclude that the Loral proposal offers nothing new and innovative, and accordingly decide that its request should be denied. Loral's system design and spread spectrum technique are not innovations.

44. *TRW.* TRW filed its pioneer's preference request on September 6, 1991. It also filed an experimental license application on April 3, 1992.[35] TRW states that its proposed system satisfies the criteria established by the Commission in its pioneer's preference rules.[36] TRW claims that its proposal to provide radiolocation, voice and data services to mobile users in all 50 states and the U.S. territories, much of Canada, and most of Mexico is a significant and innovative new use of these bands because the provision of co-primary mobile voice and data services is not specifically authorized in the RDSS bands. TRW states that its system will provide low communication time delay compared with geostationary satellites and high elevation angles to minimize obstruction by trees, buildings and terrain shadowing. It states that inexpensive service will be furnished to under-served segments of society, including emergency service providers, farmers and ranchers, truckers and travellers in rural areas, and ships and airplanes. Further, TRW states that its proposed service is nationwide and it requests a preferential nationwide grant. 04. Motorola and AMSC contend that the TRW proposal does not consist of any innovation above and beyond earlier filed LEO proposals. Motorola contends that the TRW multi-cell beam concept is very similar to Motorola's

[34] Early U.S. communications systems such as TELSTAR and RELAY also used elliptical orbits.

[35] TRW seeks authority to test the functional capabilities of its proposed radiodetermination and mobile-satellite system in three phases. Phase 1 involves laboratory and range tests of various components of its system. Phase 2 is a land-based pointto-point communication test to determine the compatibility of the proposed system hardware with its CDMA spread spectrum modulation technique. Phase 3 is an airborne test of a complete demonstration system. TRW will not launch a satellite during phase 3 of its testing. It will use aircraft to simulate communications through, and coverage of, the proposed TRW spacecraft. TRW plans to verify the functional operation of the satellite repeater and the subscriber handset and verify that link margins are adequate for coping with the varying propagation conditions that are encompassed in the system design. TRW was granted an experimental license in the 1.6, 2.5, 20, and 29 GHz bands on July 28, 1992.

[36] Although TRW has a pioneer's preference request pending, in comments filed on April 8, 1992, it urges the Commission to not grant any of the pioneer's preference requests currently pending in this proceeding. TRW contends that awarding a preference to one proponent would skew the debate over which proposed system is the best technical approach while the Commission still is gathering information on the allocation issues.

own cellular beam technology. Motorola claims that TRW's claimed innovation of combining MSS and RDSS services in one band is merely a reformulation of Motorola's service concepts. Also, Motorola argues that TRW should not be awarded a preference for incorporating CDMA spread spectrum in its design since this technique is not new or innovative.

Although its high orbiting satellites -- resulting in high elevation angles -- capitalizes on some of the benefits of higher orbits, we conclude that the TRW approach does not demonstrate an innovation for purposes of our pioneer's preference rules. TRW merely has balanced the relative advantages and disadvantages of low versus geostationary orbits and decided on medium-Earth orbit as the desirable trade-off point. We tentatively conclude that TRW has not demonstrated an innovation beyond current technology, and for this reason that its request should be denied.

47. *Motorola.* Motorola submitted a request for pioneer's preference on July 30, 1991.[37] Motorola filed a request for, experimental license on October 16, 1991.[38] Motorola claims that its system uses an innovative cellular design and spot beam technology which is somewhat analogous to present day cellular telephones in reverse. In the case of cellular telephones, a static set of cells serves a large number of mobile units, whereas in its satellite system Motorola proposes cells that will move at about 7,400 meters per second over the Earth while mobile units remain relatively stationary. However, Motorola claims that the unique nature of its satellite system is its spectral efficiency and innovative design, including the use of inter-satellite links, a combination of FDMA and TDMA access techniques, and bi-directional capabilities. Motorola also requests a nationwide service area.

48. Constellation, Ellipsat, Loral, and TRW oppose the Motorola request for pioneer's preference on the basis that the innovations claimed by Motorola are technologies that have been utilized and developed by other entities.

Ellipsat argues that all of Motorola's examples of innovations are compiled from existing technological sources. It alleges that inter-satellite links were developed initially for the Tracking Data and Relay Satellite System (TDRSS). In fact, TRW states that crosslink technology was developed by NASA and TRW prior to its proposed use by Motorola. According to Ellipsat, spot beams have been developed prior to Iridium, for example, by the Department of06Defense for the Milstar Satellite System. Further, Ellipsat contends that on-board processing, bi-directional transmissions, and frequency re-use as proposed by Motorola have been used extensively by the satellite industry.

49. We tentatively conclude that the Motorola approach does not offer a significant improvement or innovation over the state of the art. We do not find that Motorola's use of crosslink channels'[39] or its concept of moving cells and spot beams[40] are particularly innovative or that its overall concept is unique. For these reasons we tentatively conclude that Motorola's request does not meet the standard for award of a pioneer's preference and therefore should be denied.

50. Finally, it should be noted that none of the applicants provided analyses to fully demonstrate technical feasibility.[41] The information provided is at the level of

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[37] Several related Motions have been filed relative to the pioneer's preference requests. Motorola submitted a Supplement to its pioneer's preference request on April 10, 1992, including a confidential section, a portion of which was made available to the parties subject to a protective order on May 28, 1992. Ellipsat, on April 21, 1992, and Loral and TRW on April 23, 1992, filed Motions to Strike the Motorola Supplement. These Motions are dismissed as moot because the confidential material has been made available to these parties subject to a protective order and the parties received additional time to file reply comments.

Finally, on July 28, 1992, Ellipsat filed a Petition for Public Hearing with respect to all five pioneer's preference requests, arguing that such a hearing is needed to obtain information and clarify the circumstances relating to the Commission's consideration of these pioneer's preference requests. The Commission has, based on a full record, addressed each of the five requests in this Tentative Decision. We do not believe that a public hearing is necessary. Accordingly, the petition filed by Ellipsat is denied.

On June 12, 1992, AMSC filed an Application for Review of the Protective Order and a Motion to Stay action on Motorola's pioneer's preference request. On July 24, 1992, the Commission denied AMSC's application for Review and dismissed as moot the associated motion for stay. *See* FCC 92-348. TRW and Loral filed Petitions for Further Reconsideration of the Pioneer's Preference Rules on April 6, 1992. *See* GEN Docket 90-217, *supra*. On May 5, 1992, TRW also filed a Motion for Stay to delay our consideration of the pioneer's preference requests in this proceeding, pending action on its Petition for Further Reconsideration in the other Docket. TRW's Motion for Stay was denied by the Chief Engineer on July 23, 1992, DA 921175. *See also In re TRW Inc.*, No. 92-1316 D.C. Cir. Aug. 4, 1992 (denying request for writ of prohibition).

[38] Motorola, like Ellipsat, proposes four phases in its experiment. Phase 1 employs aircraft mounted transmitters to determine propagation channel impairment data to be used to develop a system simulator. Phase 2 will use the simulation equipment in a near actual environment which will be created by outfitting an aircraft with the space vehicle antenna array and electronic equipment and communicate with ground stations and prototype subscriber units. In Phase 3, a second aircraft will be added to test communication crosslinks between space platforms and additional ground communications and control features will be provided. Phase 4 will involve the construction, launch, and operation of five fully functional satellites in a configuration that would be identical to one leg of its proposed full service LEO satellite system. Motorola plans to verify the engineering evaluation and functionality of its system design during phase 4. Motorola later amended its request for authority to launch 5 satellites rather than 6. It was granted an experimental license in the 1.6, 18, 22, and 27 GHz bands on August 5, 1992.

[39] The military established crosslink feasibility in 1976 at the Lincoln Lab, as part of the development of the LES8/LES9 satellite system using geostationary satellites at 36-38 GHz. Further, the military's SDS intelligence satellite used cross-link technology in the 1980's.

[40] The Department of Defense developed its Milstar satellite system using a scanning 37 beam array antenna in order to improve coverage and frequency reuse.

[41] *See Memorandum Opinion and Order*, GEN Docket No. 90-217, 7 FCC Rcd 1808 (1992) at paragraph 11. The Commission requires that an applicant for a pioneer's preference submit

major spacecraft and ground segment systems without the subsystem details necessary to establish technical feasibility. Although it is normal for satellite designers to change their subsystem designs which, in turn, impact weight and power, none of the five LEO proponents have fully established that the detailed subsystem designs have been completed so as to fully demonstrate the technical feasibility of their systems.

51. Thus, we are unable to discern any innovative aspect of the LEO proposals that would warrant award of a pioneer's preference to any of the proponents. Based on the record, we are unable to conclude that any of the applicants has "pioneered" the proposed service or has sufficiently demonstrated that it has developed the technology used in its system. Therefore, we have tentatively determined that all five requests for pioneer's preference should be denied.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

52. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds as follows:

A. Reason for Action

This action is being initiated to allocate spectrum for a lowEarth orbit satellite service. We believe that there is a need for additional spectrum above 1 GHz for mobile-satellite for voice, data transmission and position determination services and that LEOs offer a cost effective means to accommodate this need. We also intend to protect existing users if spectrum is allocated for an LEO satellite service.

B. Objective

The objective of this proposal is to promote efficiency in the allocation of spectrum for meeting the public's requirements for low-cost voice, data transmission, and positioning services. This objective can be met by establishing a low-Earth orbit satellite service above 1 GHz. Providing for the development of LEO technology in the United States also will promote the provision of these satellite services by U.S. firms.

C. Legal Basis

The proposed action is authorized by Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r). These provisions authorize the Commission to make such rules and regulations as may be necessary to encourage more effective use of radio as is in the public interest.

D. Description, Potential Impact, and Number of Small Entities Affected

This proposal may provide new marketing opportunities for radio manufacturers, some of which may be small businesses. Because this proposal concerns only the allocation of spectrum, and not the licensing of systems or stations, we are unable to quantify other potential effects on small entities. We invite specific comments on this point by interested parties.

E. Reporting, Record Keeping and other Compliance Requirements

None.

F. Federal Rules which Overlap, Duplicate or Conflict with this Rule

None.

G. Significant Alternatives

If promulgated, this proposal will allow mobile-satellite services to share spectrum, on a co-primary basis, with aeronautical radionavigation services and the broadcast auxiliary services. We are proposing only a spectrum allocation at this time. Specific technical standards and service rules will be proposed in a future proceeding.

PAPERWORK REDUCTION ACT

53. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements, and will not increase or decrease burden hours imposed on the public.

PROCEDURAL INFORMATION

54. The rule making proposals in this *Notice* constitute a nonrestrictive notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

55. The pioneer's preference tentative decisions in this *Notice* constitute restricted adjudicative proceedings. No *ex parte* presentations are permitted until final Commission decisions regarding the preference requests are made and are no longer subject to reconsideration by the Commission or review by any court. In addition, no presentation, *ex parte* or otherwise, is permitted during the Sunshine Agenda period. *See generally* 47 C.C.R. Sections 1.1202.1.1203, and 1.1208.

56. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r).

57. Pursuant to applicable procedures set forth at in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before Dec. 4, 1992, and reply comments on or before Jan. 6, 1993. All relevant and timely comment will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Com-

either a demonstration of technical feasibility or commence an experiment and report to the Commission at least preliminary results of the experiment.

missioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

58. IT IS ORDERED THAT the Motion for Leave to accept a responsive pleading filed by AFTRCC on December 4, 1991 IS GRANTED in the interest of considering all relevant pleadings.

59. IT IS ORDERED THAT the Motions to Strike filed in regard to Motorola's Supplement by Ellipsat on April 21, 1992, and by Loral and TRW on April 23, 1992, ARE DISMISSED as Moot.

60. IT IS ALSO ORDERED THAT the Petition for Public Hearing filed by Ellipsat on July 28, 1992, IS DENIED.

61. For further information concerning this rule making contact Mr. Raymond LaForge at (202) 653-8117, Office of Engineering and Technology, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

PROPOSED RULE CHANGE

I. Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 2 – FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS;GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations is amended as follows:

a. Delete footnote US-306 from column (4) and (5) of the 1610-1626.5 MHz band;

b. Add a reference to a primary allocation for MOBILE-SATELLITE service (Earth-to-space) in column (5) of the 1610-1626.5 MHz band;

c. Replace all of columns (1), (2), and (3) for the 1610-1626.5 MHz band as shown in the appendix;

d. Add a reference to a primary allocation for the Radio Astronomy Service in the 1610.6-1613.8 MHz band.

e. Add a reference to a primary allocation for MOBILE-SATELLITE SERVICE (space-to-Earth) in column (5) of the 2483.5-2500 MHz band;

f. Delete footnote US306 from columns (4) and (5) of the 1610-1626.5 MHz band and from the United States footnote listing following the Table of Frequency of Allocations;

g. Replace all of columns (1), (2), and (3) for the 2483.5-2500 MHz band as shown in the appendix;

h. Add a reference to a primary allocation for INTER-SATELLITE SERVICE in column (2) of the 25.25-25.5 GHz, 25.5-27 GHz, and 32-32.3; in columns (1) and (2) of the 27-27.5 GHz band; and in columns (1), (2), and (3) of the 24.45-24.65 GHz and 24.65-24.75 GHz bands.

i. The new or modified text of footnotes 731A, 731B, 731C, 731D, 731X, 731Y, 734,753E, 753X, 877, 878, 881A, 881B, 882X, 882Y, and 890 replaces the current text in the list of international footnotes;

j. Upon updating the Table of Frequency Allocations, the affected sections will look as follows:

2.106 Table of Frequency Allocations

* * * * *

International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part (s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		
1610-1610.6 AERONAUTICAL RADIONAVI-GATION. MOBILE-SATELLITE (Earth-to-space). 722 727 730 731 731X 732 733 733A 733B 733E 733F	1610-1610.6 AERONAUTICAL RADIONAVI-GATION. RADIODETERMIN-ATION-SATELLITE (Earth-to-space). 733A MOBILE-SATELLITE (Earth-to-space). 722 731X 732 733 733C 733D 733E	1610-1610.6 AERONAUTICAL RADIONAVI-GATION. MOBILE-SATELLITE (Earth-to-space). Radiodetermin-ation-Satellite (Earth-to space). 733A 722 727 730 731X 732 733 733B 733E	1610-1610.6 AERONAUTICAL RADIONAVI-GATION. 722 732 733 US208 US260	1610-1610.6 AERONAUTICAL RADIONAVI-GATION. RADIODETERMIN-ATION-SATELLITE (Earth-to-space). 733A MOBILE-SATELLITE (Earth-to-space). 722 731X 732 733 733E US208 US260	AVIATION (87). SATELLITE COMMUNICATION (25).	
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2.106 Table of Frequency Allocations

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International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part (s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1610.6-1613.8 AERONAUTICAL RADIONAVI-GATION. MOBILE-SATELLITE (Earth-to-space). RADIO ASTRONOMY 722 727 730 731 731X 732 733 733A 733B 733E 733F 734	1610.6-1613.8 AERONAUTICAL RADIONAVI-GATION. RADIODETERMIN-ATION-SATELLITE (Earth-to-space). 733A MOBILE-SATELLITE (Earth-to-space). RADIO ASTRONOMY. 722 731X 732 733 733C 733D 733E 734	1610.6-1613.8 AERONAUTICAL RADIONAVI-GATION. MOBILE-SATELLITE (Earth-to-space). RADIO ASTRONOMY Radiodetermin-ation-Satellite (Earth-to-space). 733A 722 727 730 731X 732 733 733B 733E 734	1610.6-1613.8 AERONAUTICAL RADIONAVI-GATION. RADIO ASTRONOMY. 722 732 733 US208 US260	1610.6-1613.8 AERONAUTICAL RADIONAVI-GATION. RADIODETERMIN-ATION-SATELLITE (Earth-to-space). MOBILE-SATELLITE (Earth-to-space). RADIO ASTRONOMY. 722 731X 732 733 733E 734 US208 US260		

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2.106 Table of Frequency Allocations

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International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part (s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		
1613.8-1626.5 AERONAUTICAL RADIONAVIG-ATION. MOBILE-SATELLITE (Earth-to-space). Mobile-Satellite (space-to-Earth). 722 727 730 731 731X 731Y 732 733 733A 733B 733E 733F	1613.8-1626.5 AERONAUTICAL RADIONAVIG-ATION. RADIODETERMIN-ATION-SATELLITE (Earth-to-space). 733A MOBILE-SATELLITE (Earth-to-space). Mobile-Satellite (space-to-Earth). 722 731X 731Y 732 733 733C 733D 733E	1613.8-1626.5 AERONAUTICAL RADIONAVIG-ATION. MOBILE-SATELLITE (Earth-to-space). Radiodetermin-ation-Satellite (Earth-to-space). Mobile-Satellite (space-to-Earth). 722 727 730 731X 731Y 732 733 733B 733E	1613.8-1626.5 AERONAUTICAL RADIONAVIG-ATION. 722 732 733 US208 US260	1613.8-1626.5 AERONAUTICAL RADIONAVIG-ATION. RADIODETERMIN-ATION-SATELLITE (Earth-to-space). MOBILE-SATELLITE (Earth-to-space). Mobile-Satellite (space-to-Earth). 722 731X 731Y 732 733 733E US208 US260		

2.106 Table of Frequency Allocations

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International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part (s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		
2483.5-2500 FIXED. MOBILE. MOBILE-SATELLITE (space-to-Earth). Radiolocation. 733F 752 753 753A 753B 753C 753X	2483.5-2500 FIXED. MOBILE. RADIODETERMIN-ATION-SATELLITE (space-to-Earth). 753A RADIOLOCATION. MOBILE-SATELLITE (space-to-Earth). 752 753D 753X	2483.5-2500 FIXED. MOBILE. RADIOLOCATION MOBILE-SATELLITE (space-to-Earth). Radiodetermin-ation-Satellite (space-to-Earth). 753A 752 753C 753X	2483.5-2500 752 US41	2483.5-2500 RADIODETERMIN-ATION-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth). 752 753X US41 NG147	Satellite communica-tion (25).	
*	*	*	*	*		

2.106 Table of Frequency Allocations

* * * * *

International Table			United States Table		FCC use designators	
Region 1 Allocation GHz	Region 2 Allocation GHz	Region 3 Allocation GHz	Government Allocation GHz	Non-Government Allocation GHz	Rule Part (s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		
24.25-24.45 RADIONAVIGATION.			24.25-24.45 RADIONAVIGATION		AVIATION (87).	
24.45-24.65 FIXED. INTER-SATELLITE.	24.45-24.65 RADIONAVIGATION. INTER-SATELLITE. 882X	24.45-24.65 RADIONAVIGATION FIXED. INTER-SATELLITE. MOBILE 882X	24.45-24.65 INTER-SATELLITE. 882X		SATELLITE (25).	
24.65-24.75 FIXED. INTER-SATELLITE.	24.65-24.75 INTER-SATELLITE. RADIOLOCATION-SATELLITE (Earth-to-space).	24.65-24.75 FIXED. INTER-SATELLITE. MOBILE. 882X 882Y	24.65-24.75 INTER-SATELLITE. RADIOLOCATION-SATELLITE (Earth-to-space).		SATELLITE (25).	

2.106 Table of Frequency Allocations

* * * * *

International Table			United States Table		FCC use designators	
Region 1 Allocation GHz	Region 2 Allocation GHz	Region 3 Allocation GHz	Government Allocation GHz	Non-Government Allocation GHz	Rule Part (s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		
24.75-25.25 FIXED.	24.75-25.25 FIXED-SATELLITE (Earth-to-space). 882z.	24.75-25.25 FIXED. FIXED-SATELLITE (Earth-to-space). MOBILE. 882Y	24.75-25.25 FIXED-SATELLITE (Earth-to-space). 882z		SATELLITE (25).	
25.25-25.5	FIXED. MOBILE. INTER-SATELLITE. 881A Standard Frequency and Time Signal-Satellite (Earth-to-space).		25.25-25.5 FIXED. MOBILE. INTER-SATELLITE. 881A Standard Frequency and Time Signal-Satellite (Earth-to-space).		SATELLITE (25).	

* * * * *

2.106 Table of Frequency Allocations

* * * * *

International Table			United States Table		FCC use designators	
Region 1 Allocation GHz	Region 2 Allocation GHz	Region 3 Allocation GHz	Government Allocation GHz	Non-Government Allocation GHz	Rule Part (s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		
25.5-27	FIXED. MOBILE. INTER-SATELLITE. 881A Earth Exploration-Satellite (space-to-Earth). Standard Frequency and Time Signal-Satellite (Earth-to-space).		25.5-27 FIXED. MOBILE. INTER-SATELLITE. 881A Earth Exploration-Satellite (space-to-Earth). Standard Frequency and Time Signal-Satellite (Earth-to-space).		SATELLITE (25).	
27-27.5 FIXED. MOBILE. INTER-SATELLITE. 881A	FIXED. FIXED-SATELLITE (Earth-to-space). MOBILE. INTER-SATELLITE.881A 881B		27-27.5 FIXED. FIXED-SATELLITE (Earth-to-space). MOBILE. INTER-SATELLITE. 881A 881B		SATELLITE (25).	
*	*	*	*	*		

INTERNATIONAL FOOTNOTES

* * * * *

731A -- Deleted.

731B -- Deleted.

731C -- Deleted.

731D -- Deleted.

* * * * *

731X -- The use of the band 1610-1626.5 MHz by the mobile-satellite service (Earth-to-space) and by the radiodetermination-satellite service (Earth-to-space) is subject to the application of the coordination and notification procedures set forth in Resolution COM5/8. A mobile earth station operating in either of the services in this band shall not produce an e. i. r. p. density in excess of -15 dBW/4kHz in the part of the band used by systems operating in accordance with the provisions of NO. 732, unless otherwise agreed by the affected administrations. In the part of the band where such systems are not operating, a value of -3 dBW/4 kHz is applicable. Stations of mobile-satellite service shall not cause harmful interference to, or claim protection from, stations in the aeronautical radionavigation service, stations operating in accordance with the provisions of No. 732 and stations in the fixed service operating in accordance with the provisions of No. 730.

731Y -- The use of the band 1613.8-1626.5 MHz by the mobile-satellite service (space-to-Earth) is subject to the application of the coordination and notification procedures set forth in Resolution COM5/8.

* * * * *

733E -- Modified-- Harmful interference shall not be caused to stations of the radio astronomy service using the band 1610.6-1613.8 MHz by stations of the radiodetermination-satellite and mobile-satellite services (No. 2904 applies.)

* * * * *

734-- Modified -- In making assignments to stations of other services, administrations are urged to take all practicable steps to protect the radio astronomy service in the band 1610.6-1613.8 MHz from harmful interference. Emissions from space or air-borne stations can be particularly serious sources of interference to the radio astronomy service (see Nos. 343 and 344 and Article 36).

* * * * *

753E -- Deleted.

* * * * *

753X -- The use of the band 2483.5-2500 MHz by the mobile-satellite and the radiodetermination-satellite services is subject to the application of the coordination and notification procedures set forth in Resolution COM5/8. Coordination of space stations of the mobile-satellite and radiodetermination-satellite services with respect to terrestrial services is required only if the power flux-density produced at the Earth's surface exceeds the limits in No. 2566. In respect of assignments operating in this band, the provisions of Section II, paragraph 2.2 of Resolution COM5/8 shall also be applied to geostationary transmitting space stations with respect to terrestrial stations.

* * * * *

877 -- Deleted.

878 -- Deleted.

* * * * *

881A -- Use of the 25.25-27.5 GHz band by the inter-satellite service is limited to space research and Earth exploration applications and also transmissions of data originating from industrial and medical activities in space.

881B -- Space services using non-geostationary satellites operating in the inter-satellite service in the band 27-27.5 GHz are exempt form the provisions of No. 2613.

* * * * *

882X -- The inter-satellite service shall not claim protection from harmful interference from airport surface detection equipment stations of the radionavigation service.

* * * * *

890 -- Deleted.

891 -- Deleted.

* * * * *

APPENDIX B

Parties Filing Comments to the AMSC Petition for Rule Making:

AFTRCC

Association of American Railroads

COMSAT

Constellation

CORF

Loral

Motorola

NTIA

Satellite CD Radio

TRW

Parties Filing Reply Comments to the AMSC Petition for Rule Making:

AFTRCC

AMSC

COMSAT
Constellation
Ellipsat
Loral
Motorola

Parties Filing Response to Reply Comments of AMSC and Motion for Leave to Accept Responsive Pleading:

AFTRCC

Parties Filing Comments to the Constellation Petition for Rule Making:

AMSC
COMSAT
CORF
Loral
Motorola
TRW

Parties Filing Reply Comments to the Constellation Petition for Rule Making:

AMSC
COMSAT
Constellation
Ellipsat
Loral
Motorola

Parties Filing Comments to the TRW Petition for Rule Making:

AMSC
COMSAT
Constellation
CORF
Loral
Motorola

Parties Filing Reply Comments to the TRW Petition for Rule Making:

AMSC
COMSAT
Constellation
Ellipsat
Loral
Motorola
TRW

Parties Filing Comments to the Ellipsat Petition for Rule Making:

AMSC
COMSAT
CORF
Loral
Motorola
TRW

Parties Filing Reply Comments to the Ellipsat Petition for Rule Making:

AMSC
COMSAT
Constellation
Ellipsat
Loral
Motorola

Parties Filing Comments to the Pioneer's Preference Requests:

AMSC
Constellation
Ellipsat
Loral
Motorola
TRW

Parties Filing Reply Comments to the Pioneer's Preference Requests:

AMSC
Constellation
Ellipsat
Loral
Motorola
TRW

Parties Filing Other pleadings in the Proceeding:

AMSC
Constellation
Ellipsat
Loral
Motorola
TRW
SCS Mobilecom Inc.

SEPARATE STATEMENT
OF COMMISSIONER ANDREW C. BARRETT

RE: Amendment of Section 2.106 of the Commission's Rules to Allocate the 1610-1626.5 MHz and 2483.5-2500 MHz bands for use by the Mobile-Satellite Service, including Non-geostationary satellites [ET Docket 92-28].

I support this Notice of Proposed Rulemaking and Tentative Decision as an important step in the Commission's efforts to promote a competitive market for mobile communications services. In addition to our Personal Communications Services dockets [Gen Docket 90-314 and ET Docket 92-100], I consider this docket to be another significant means of addressing the growing market demand for mobile services, both in the United States and abroad. I believe that mobile satellite communications will prove crucial to our efforts to encourage ubiquitous communications services throughout the United States, particularly in sparsely populated areas. These mobile satellite services also could provide emergency communications capabilities and international communications to and from the United States. Thus, I look forward to reviewing the comments in this docket with respect to spectrum allocation issues. I am particularly interested in reviewing comments that pertain to our ability to allocate spectrum to multiple LEO providers within the bands outlined in the Notice.

I am aware of the tremendous international cooperation at the 1992 World Administrative Radio Conference [WARC-92] which resulted in an international allocation for mobile-satellite services in the 1610-1626.5 and 2483.5-2500 MHz bands. I am particularly pleased to see that we also have the flexibility to consider the authorization of low-Earth orbit [LEO] satellite systems in this band. In that regard, while I support the tentative decision to grant no pioneer preference to any of the LEO proponents based on current information, I question whether our pioneer preference rules [Gen Docket 90-217] should be modified to ensure that this tentative decision is made closer to the time that service rules are proposed. I am concerned that at a stage where no experiments have been authorized, detailed technical feasibility showings have not been made, and no spectrum allocation for a particular service has been completed, it is difficult to assess the relative merits of any new service proposals. I do believe that in any docket for new services, the system selected as the tentative pioneer preference should contribute significantly to the eventual service and technical rules proposed for that service. Where it is not possible to make this determination at the time of our tentative decision, I question whether our pioneer preference rules should be modified to require that the decision is made closer to the time of proposed service rules. Further, without significant detailed technical feasibility showings or experimental results, I question whether we should accept pioneer preference applications based on general service proposals only. I will be interested in reviewing the comments in this docket and the pioneer preference docket, which address these concerns. I believe our pioneer preference rules can provide significant incentives to conduct research, and propose innovative services or improvements to existing services. However, I also believe that these rules should be modified, where necessary, to ensure that the Commission implements them in the intended manner.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-221

In the Matter of

Review of the Commission's
Regulations Governing Television
Broadcasting

ORDER DENYING EXTENSION OF TIME

Adopted: September 15, 1992; Released: September 17, 1992

By the Chief, Mass Media Bureau:

1. On May 14, 1992, the Commission adopted a *Notice of Proposed Rulemaking* in MM Docket No. 91-221, 7 FCC Rcd 4111 (1992), in order to seek comment on alternative means of lessening the regulatory burden on television broadcasters as they seek to adapt to the multichannel video marketplace. The Commission established a deadline of August 24, 1992, for filing comments and a deadline of September 23, 1992, for filing reply comments.

2. Before the Commission is a request for extension of time filed by the Media Access Project and the Office of Communication of the United Church of Christ on September 3, 1992. The parties request an extension of time to file reply comments until October 23, 1992.

3. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, it is our policy that extensions of time not be routinely granted. In this instance, we are not persuaded that parties will not have sufficient time to prepare reply comments. Therefore, we deny the request.

4. Accordingly, IT IS ORDERED that the Request for Extension of Time to Submit Reply Comments filed by the Media Access Project and the Office of Communication of the United Church of Christ IS DENIED.

5. This action is taken prusuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, and 1.46 of the Commission's Rules.

6. For further information concerning this proceeding, contact Beverly McKittrick, Policy and Rules Division, Mass Media Bureau, (202) 632-5414.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Double L Broadcasting of Lansing Limited Partnership For Renewal of Licenses for Stations WJIM/WJIM-FM Lansing, Michigan	File Nos. BR - 890519UN BRH - 890519UL
Liggett Broadcast, Inc. For Renewal of Licenses for Stations WBCK/WBXX-FM Battle Creek, Michigan	File Nos. BR - 890602UN BRH - 890602UP
Washtenaw Broadcasting Company, Inc. For Renewal of Licenses for Stations WPZA/WAMX-FM Ann Arbor, Michigan	File Nos. BR - 890601ZX BRH - 890601ZQ
Goodrich Broadcasting, Inc. For Renewal of Licenses for Stations WVIC/WVIC-FM East Lansing, Michigan	File Nos. BR - 890601ZU BRH - 890601ZV
Whitehall Convalescent Homes, Inc. For Renewal of License for Station WAAM(AM) Ann Arbor, Michigan	File No. BR - 890525VG
Liggett Broadcast, Inc. For Renewal of License for Station WFMK-FM East Lansing, Michigan	File No. BR - 890602UQ

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: September 14, 1992; Released: September 25, 1992

By the Commission: Commissioner Quello concurring in the result.

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I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications filed for ten radio stations in Michigan; (ii) a Petition to Deny timely filed on September 1, 1989, by the Michigan State Conference of Branches of the NAACP, respective branches of the NAACP operating within the service areas of the referenced stations and the National Black Media Coalition (hereinafter "NAACP/NBMC") against the renewal applications of these broadcast stations;[1] (iii) oppositions from the licensees; (iv) the licensees' responses to staff letters of inquiry; and (v) other pleadings.[2] NAACP/NBMC allege that the stations violated the Commission's equal employment opportunity (EEO) Rule and policies. NAACP/NBMC request that the Commission designate all of the renewal applications for hearing. Conversely, the licensees claim that NAACP/NBMC fail to raise any substantial and material questions of fact and request immediate and unconditional renewal of their licenses.

II. BACKGROUND

2. *STANDING.* With the exception of Double L Broadcasting of Lansing, the licensees challenge NAACP/NBMC's standing to petition the instant renewal applications. They argue that the statements submitted with the Petition to Deny fail to meet the requirements of Section 309(d)(1) because the persons fail to state that they are either residents of any of the service areas of the challenged stations or listeners to any of the stations. Because NAACP/NBMC allegedly fail to demonstrate party in interest status, the licensees request dismissal of the petition.

3. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989) (*Dubuque*). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

4. Submitted with the petition to deny was a declaration under penalty of perjury from the President of the Michigan State Conference of Branches of the NAACP. While timely submitted, the statement does not indicate that he is either a listener to the challenged stations or a local resident of their service areas. However, the pleading also included three statements from the President of the Lansing, Michigan Branch of the NAACP. Under penalty of perjury, he stated that he is a listener to stations WJIM/WJIM-FM, WVIC/WVIC-FM and WFMK-FM. Accordingly, we hold that the Michigan State Conference of Branches of the NAACP and its affiliate branches have petitioner status against stations WJIM/WJIM-FM and WFMK-FM.[3] *American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987); *see also Petition for Rule Making to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89 (1980) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). However, because the petition did not include declarations from any officials or members of the other local branches of the NAACP sufficient to establish standing against the remaining referenced stations, we hold that NAACP lacks standing to petition stations WBCK/WBXX-FM, WPZA/WAMX-FM and WAAM(AM) and we will treat its pleading as an informal objection in accordance with 47 C.F.R. 73.3584 (b). *See Michigan/Ohio Broadcast Renewals*, 3 FCC Rcd 6944 (1988); *see also KDEN Broadcasting Company*, 55 Rad. Reg. 2d (P&F) 1311, 1311-12 (1984).

5. Lastly, the petition contained a statement under penalty of perjury from the chairman of the NBMC, a resident of the Washington, D.C. area. However, the Commission has held previously that the statement of a person who, as is the case here, does not claim to be a listener of the challenged station nor a resident of its service area does not satisfy the standing requirements of the Act. *See Michigan/Ohio*, *supra* and *KDEN*, *supra*. Accordingly, we hold that NBMC lacks standing to petition the referenced Michigan stations and, thus, we will treat its pleading as an informal objection. 47 C.F.R. 73.3584(b).

III. PLEADINGS

6. NAACP/NBMC derived their factual allegations from the licensees' EEO programs and annual employment reports. Review of the licensees' EEO records led us to conclude that NAACP/NBMC had presented a *prima facie* case against the ten stations, demonstrating that unconditional grant of the renewal applications would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act of 1934, 47 U.S.C. Section 309(d)(1). *Astroline*, *supra*.[4] Further inquiry was therefore necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988)(*Beaumont*); *Bilingual Bicultural Coalition v. FCC*, 595 F.2d 621 (D.C. Cir. 1978)(*Bilingual*).

7. Our subsequent evaluation of the stations' EEO efforts, based on review of NAACP/NBMC's allegations, the licensees' renewal applications, oppositions, and inquiry responses, leads us now to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence that any licensee engaged in discrimination. Thus, grant of each application will serve the public interest. 47 U.S.C. Section 309(d)(2); *Astroline*, *supra*. Accordingly, we will grant renewal but with appropriate remedies and sanctions as discussed herein.

IV. DISCUSSION

8. Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080(b) and 73.2080(c).

9. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987)(*Broadcast EEO*), *petition for recon. pending*; *see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters). *See e.g.*, *Beaumont*, *supra*; *Bilingual*, *supra*.

WJIM/WJIM-FM, Lansing[5]

10. Review of the licensee's renewal applications, opposition and inquiry response reveals the licensee filled 14 full-time upper-level jobs from February 1, 1988, to April 1, 1989.[6] The licensee reported its recruitment efforts and minority referrals during this period as follows: *Lansing State Journal* (five minority referrals), Greater Lansing Urban League (two minority referrals), walk-in applicants (two minority referrals), employee referrals (one minority referral), Davenport College of Business, Lansing Community College, Michigan State University, *Jackson Citizen Patriot*, Specs Howard School of Broadcasting, on-air job announcements, industry contacts, American Women in Radio and Television, NAACP, *Radio & Records*, Lansing Advertising Club, and Michigan Association of Broadcasters. For each job opening, the licensee sent letters to its referral sources which described the positions, qualifications and application methods. It also contacted the leadership of these organizations to encourage additional qualified minority candidates. Contacts with the sources resulted in ten minority applicants out of 76 total applicants, ten minority interviewees out of 76 total interviewees and two minority upper-level hires.

11. NAACP/NBMC question whether the licensee consistently contacted the referral sources during the license term since the only sources of minority referrals were those responding to newspaper advertisements, employee referrals and walk-in applicants. NAACP/NBMC argue that the licensee is decreasing its EEO efforts because the renewal applications list only one minority recruitment organization, whereas the licensee identified two minority recruitment organizations on its 1987 assignment applications' EEO programs. Lastly, since no minorities were reported on the stations' annual employment reports,

NAACP/NBMC dispute the licensee's assertion that it hires minorities but has difficulty keeping them once they are trained because they leave to work in larger markets.

12. The licensee argues that its program has been implemented in full compliance with Commission requirements because specific recruitment efforts were made for each hiring opportunity, appropriate documentation was retained and analyzed, and minority hiring efforts were reviewed twice yearly by management staff. The licensee also maintains that it used two minority specific sources and the omission of the second source from the renewal application was an oversight. Lastly, the licensee explained that its difficulty in retaining minority employees is exemplified by the case of an Hispanic female hired for a sales position in June 1988, who resigned to accept a better paying sales position with a station in a larger market. It also reported that it hired a Black male for an upper-level position in April 1989, who did not report for work because he accepted a higher-paying job with a television station.

13. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing. During the licensee's tenure the stations utilized diverse referral sources and succeeded in attracting female and minority applicants for its 14 positions.[7] The record indicates that the licensee attracted ten minority applicants, interviewed ten minorities and hired two minorities.

14. Further, after acquiring the stations on February 1, 1988, the instant licensee initiated an EEO program, conducted some self-assessment and modified its EEO program. Given the licensee's performance, we conclude that unconditional grant of the applications is appropriate.[8]

WBCK/WBXX-FM, Battle Creek[9]

15. Review of the licensee's renewal applications, opposition and inquiry response reveals that during the period December 16, 1986, through May 1, 1989, the licensee had 24 full-time, including 18 upper-level, hiring opportunities.[10] During this period the licensee utilized these sources: present employees (two minority referrals), *Battle Creek Inquirer*, NAACP, along with 15 other sources which referred no minorities. However, review of the licensee's inquiry response reveals that the majority of these 18 sources were used only to recruit for two sales positions filled on March 6, 1989, near the end of the license term. Because the licensee failed to collect interviewee data, no information is available on the number of minorities interviewed. Stating that it was unaware of the responsibility to maintain employment activity records, the licensee relied on management's recollection to produce the requested data and asserted that "it is probable that the number of minority applicants is understated."[11] The licensee reported hiring three minority applicants, two for full-time lower-level positions and one for an upper-level position. Lastly, the licensee explained that its Big Band format[12], its semi-rural locale, limited access by public transportation and competition from large entities such as General Foods, Ralston and the Veterans Administration are "limiting factors" which affect its recruitment efforts.[13]

16. NAACP/NBMC allege that the licensee has been "inattentive" to its EEO recruitment program since taking control of the stations and they question the veracity of its reported EEO contacts. NAACP/NBMC charge that the licensee intends to add essentially the same four minority and female sources to its EEO program that it previously "promised to use" in its 1986 assignment applications. Additionally, NAACP/NBMC argue that the licensee's comments regarding its format, location and competition from large employers "harbors intense and demeaning racial stereotypes."

17. While not directly responding to NAACP/NBMC's challenges, the licensee submitted, after the petition was filed, amended renewal applications that indicated that the four female and minority organizations discussed in the petition to deny were contacted between May 1, 1988, and May 1, 1989, but produced no referrals. The licensee also stated that its minority hiring overall has complied with the Commission's processing guidelines. Regarding self-assessment, it added that it has tried to eliminate inconsistencies in its recruitment contacts.

18. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing. Our investigation revealed that the licensee used several minority specific as well as general organizations to announce its vacancies. Moreover, minority applicants were attracted and employed during the license term.

19. We do find, however, that the licensee took inadequate EEO measures during its tenure. The record herein is similar to, but not as deficient as, that of WRGI(FM), located in Naples, Florida which had a 14% minority (9.9% Hispanic) labor force, a full-time staff of 16 employees and received reporting conditions based on its EEO record. *See WRGI (FM)*, 4 FCC Rcd 3463 (1989). The licensee of WRGI(FM) reported 18 hiring opportunities over an 18-month period for which it contacted only one minority referral source, but not for specific vacancies. The licensee reported no minorities on staff, no minority referrals and modified its efforts after filing its renewal application in June 1988. Moreover, its record-keeping was poor and the record did not reveal self-assessment efforts.

20. WBCK/WBXX-FM's performance was somewhat more effective than that of WRGI(FM) because WBCK recruited with three minority sources and employed minorities during the license term. However, WBCK's EEO program suffers from similar shortcomings. It used an extensive group of minority and female referral sources but only for two of 24 vacancies. Moreover, it failed to keep records on its interviewee pool, did not self-assess its efforts during much of the license term, and did not modify its program until March 1989. Therefore, while we find grant of the renewal application in the public interest, we will impose reporting conditions in order to monitor future performance.

WPZA/WAMX-FM, Ann Arbor[14]

21. Review of the licensee's renewal applications, opposition and inquiry response indicates that the licensee had 20 overall, including 16 upper-level, positions from January 1, 1987, through June 1, 1989.[15] The licensee reported its minority referrals as the following: Specs Howard School of Broadcasting (four minority referrals), *Ann Arbor News* (four minority referrals), employee referrals (two minority referrals), Eastern Michigan University (one minority referral), unsolicited applications (one minority referral), and Minority Placement of University of Michigan (one minority referral). The licensee also reported recruitment contact with three local sources, three recruitment agencies, three educational institutions and one regional publication. Although it reported 16 sources, the licensee used only two to four of these sources to recruit for the 13 positions open prior to August 1988. The licensee attracted 13 minority applicants out of 81 total applicants. It conducted 17 minority interviews for nine of 20 full-time positions. Of the 16 upper-level openings, minorities were not interviewed or considered for 11 of these positions.[16] It hired five minorities, four of whom were for lower-level positions. While its 1987 Annual Employment Report did not reflect minority employees, the licensee stated that it employed minorities in full-time positions from 1987 to 1989. Review of the record revealed that, with the exception of the hire of a Black male in April 1989, near the end of the license term, minorities were not employed in full-time upper-level positions.

22. Noting that only one minority referral was received from contact with three minority organizations from June 1, 1988, to June 1, 1989, NAACP/NBMC charge that the licensee's EEO program is ineffective because the minority recruitment groups apparently were not contacted for each vacancy. Further, NAACP/NBMC allege that minority recruitment for the stations' internship program is less than affirmative since the licensee has not reported any minority students in its program.

23. While not specifically addressing NAACP/NBMC's charges, the licensee stated that it has recruited "via telephone calls to minority referral sources, newspaper advertisements, employee recommendations and an internship program with various colleges and universities." Regarding its internship program at local universities, it adds that its employees are encouraged to recommend qualified minority candidates for vacancies at the stations.

24. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing. No allegations of discrimination have been raised, nor does the record reveal any such evidence. Our investigation disclosed that the licensee's contacts with its sources resulted in 13 minority applicants, 17 minority interviews and five minority hires.[17] We accordingly find that grant of the renewal applications for WPZA/WAMX serves the public interest. However, in view of the absence of minorities in the pools for 11 of the licensee's 16 upper-level hiring opportunities and the licensee's resulting lack of any minority hires for an upper-level position until the end of the license term, we admonish the licensee to improve its recruitment efforts to attract qualified minorities for upper-level jobs.

WVIC/WVIC-FM, East Lansing

25. Review of the licensee's renewal applications, opposition and inquiry response indicates that the licensee had 21 full-time, including 17 upper-level, hiring opportunities from March 1, 1986, to March 1, 1989.[18] During this period, the licensee contacted and received referrals from: NAACP (two minority referrals), Greater Lansing Urban League (two minority referrals), Christo Rey Community Center (one minority referral), *Lansing State Journal*, *MSU State News*, North American Indian Center, Southern Illinois University (three minority referrals), Michigan State University (one minority referral), Lansing Community College (one minority referral), employee referrals, Central Michigan University and Albion College. These sources were used to recruit for ten of the 21 full-time positions. For the remaining 11 positions, the licensee listed "Not Known" for recruitment sources contacted for ten positions and no recruitment for one position. Although the licensee did not know the composition of its interview pool for nine of the 21 positions, the licensee reported that it interviewed 51 minorities (information on 11 of the 51 minority interviewees was based on recollection) out of a total of 118 interviewees for nine of 12 positions and hired one minority in 1988 for an upper-level position.

26. Based on the foregoing, we find no substantial and material question of fact sufficient to warrant a hearing. Use of general as well as female and minority organizations helped the licensee to attract 51 minority interviewees and hire one minority for a full-time position.

27. WVIC/WVIC-FM's EEO efforts during the license term, however, were inadequate. The record in this case is similar to, but not as serious as, that of WVNA/WVNA-FM in *In re Certain Broadcast Stations Serving Communities in the States of Alabama and Georgia*, 6 FCC Rcd 5968, 5970 (1991) in which we granted renewal subject to reporting conditions and a Notice of Apparent Liability for $3,000. We concluded that the licensee therein failed to conduct a continuing program of EEO recruitment efforts because it affirmatively recruited with general sources for only six of its 13 positions. The licensee's limited efforts attracted three minority applicants for three of ten applicant pools (record data for three positions was unclear). Further, the licensee failed to alter its efforts even though no minorities were employed in upper-level jobs for the last three years of the license term. In an 11.6% minority labor force, the licensee utilized no minority sources despite its difficulty attracting minorities. Further, WVNA/WVNA-FM hired only one minority for a lower-level position.

28. Likewise, although WVIC/WVIC-FM recruited for 10 positions, it did not provide evidence that it utilized its EEO program for 11 other jobs. Thus, the licensee did not substantiate the existence of an ongoing EEO program for more than half of its openings. Moreover, despite having a pool of nearly 50% minority applicants for nine positions, the licensee hired only one minority of 21 overall hires, further indicating inadequate efforts to recruit qualified minorities. WVIC/WVIC-FM, like WVNA/WVNA-FM, also reported few minorities in upper-level positions during the license term and did not undertake meaningful self-assessment of its EEO program. We, accordingly, will impose reporting conditions on WVIC/WVIC-FM in an effort to encourage the licensee's recruitment, record-keeping and assessment practices.

WAAM (AM), Ann Arbor

29. By letter of October 9, 1989, the licensee stated it did not keep the detailed records for the period May 15, 1985, to May 15, 1988, asked for in a Commission inquiry. Thus, the licensee could provide no details on the number of hiring opportunities during the period in question, whether it recruited for these positions, whether they were upper or lower-level, or how many minorities or women applied, were interviewed or employed.

30. Review of the licensee's annual employment reports, renewal application and the opposition to the petition indicate that for its 17 full-time, including 13 upper-level, hiring opportunities during the period May 15, 1988, to May 15, 1989, the licensee received minority referrals from these sources: *Ann Arbor News* (one minority referral), *Ypsilanti Press* (one minority referral), Cleary College (one minority referral), and Eastern Michigan University (one minority referral).[19] The licensee also reported contact with Credit Women International, Specs Howard School of Broadcasting, the University of Michigan and employee referrals. The licensee indicated that it sponsors internships and co-op employment programs with local schools. Information submitted by the licensee does not include complete applicant flow data for the positions filled in the reporting year. However, it appears that at least three minority applicants were interviewed and hired for three upper-level positions during that year.

31. NAACP/NBMC charge that the licensee failed to use the Washtenaw County Black Economic Development League and CETA program as minority recruitment sources as it proposed in its 1983 assignment application and failed to report any other minority organizations in its renewal application. NAACP/NBMC also argue that the licensee has not assessed its EEO program because its renewal application did not address how it would correct its "longstanding EEO record of few or no minority employees."

32. In response, the licensee stated that CETA and the Washtenaw County Black Economic Development League are no longer in the area and "would not be useful sources of job applicants." The licensee added that its "current practice" is to contact area educational institutions, including Cleary College, Eastern Michigan University, Specs Howard School of Broadcasting and the University of Michigan. It also states that, while not minority specific organizations, its educational sources have "significant" minority student populations. The licensee states that, although its minority hiring record may be "modest," it employed at least one full-time upper-level minority employee during the license term except for the years 1985 and 1988.[20]

33. Our review of the licensee's record reveals no evidence of discrimination nor does it raise a substantial and material question of fact warranting further inquiry. Moreover, we note that the licensee reported three minority interviewees and three minority hires.

34. However, our review reveals that the licensee took inadequate EEO efforts during the license term. The record in the instant case is similar to, but less egregious than, that of stations WBTB/WZYC-FM on which we imposed reporting conditions and a Notice of Apparent Liability for $5,000. *See WINFAS, Inc. et al.*, 5 FCC Rcd 4902 (1990). The stations reported a full-time staff of 22 employees in an MSA including 9.2% minorities. The licensee filled 27 full-time jobs during the period December 1985 to May 1988. The licensee interviewed (but did not hire) only one minority for those 27 positions. Between December 1985 and July 1987, the licensee contacted only general recruitment sources. Its general sources included three newspapers, two colleges, NOW, two military offices, and the state employment security commission. Between August 1987 and May 1988, the licensee added one minority source, the NAACP, and reported ten minority referrals, one minority interviewee, but no minority hires. It was only at the very end of the license term, after May 1988, that the licensee hired two minority employees, one of whom left after six weeks. We found the licensee's belated and inconsistent efforts resulted in the absence of minority interviewees, hires and employees during most of the license term, and, hence, a failure to initiate a meaningful EEO program.

35. Like WBTB/WZYC-FM, WAAM had an ineffective EEO program until the last year of the license term, as evidenced by its failure to provide any data regarding its employment activity as requested in our letter of inquiry. The stations of both licensees are located in MSAs with similarly sized minority components. Like WBTB/WZYC-FM, WAAM(AM) failed to use minority sources for recruitment until the last year of the term, notwithstanding the fact that its general sources were unproductive for minorities. WAAM's general sources included two newspapers, three colleges, one broadcasting school, one women's organization and employee referrals. It reported four minority referrals for the last reporting year. Nonetheless, although WAAM(AM) -- like WBTB/WZYC-FM -- apparently did not hire any minorities until the last year of the term, WAAM(AM) did hire three minorities that year, all for upper-level positions, which reflects stronger recruitment efforts than WBTB/WZYC-FM. Accordingly, we will impose reporting conditions in order to monitor the licensee's future efforts[21] and issue a forfeiture in the amount of $2,500 for repeated violations of Commission rule 73.2080 (b)(3), (b)(5), (c)(2), and (c)(5), 47 C.F.R. 73.2080 (b)(3), (b)(5), (c)(2), and (c)(5).

WFMK-FM, East Lansing[22]

36. Review of the licensee's renewal application, opposition and inquiry response indicates that the licensee had 47 full-time, including 35 upper-level, hiring opportunities from December 1986, when it acquired the license, to June 1, 1989.[23] The licensee used 36 sources to attract minority and female applicants and reported minority referrals from Christo Rey Community Center (one minority referral), Lansing Community College (one minority referral), on-air announcements (one minority referral), former employees (one minority referral). The licensee also reported use of, but received no minority referrals from, seven publications, seven educational institutions, six minority and female organizations, five local and station-based sources (*e.g.*, co-owned stations), five recruitment agencies and two consultants. The data show two additional minority referrals and interviewees, but, the licensee did not provide information on the referral sources. Review of the licensee's records reveals that it contacted 17 to 24 sources regarding 12 vacancies. It recruited for eleven positions with two to seven general sources, which generated a total of one minority referral. It used only one source to recruit for 15 jobs. For the remaining nine vacancies, the licensee did not recruit. Thus, 24 of the 47 positions were filled with bare minimum or no outreach efforts. The licensee's records on

applicants and interviewees is incomplete. From the record, it appears the licensee did not hire any minorities for its 47 full-time positions.[24]

37. NAACP/NBMC allege that the licensee's EEO program is inadequate because it has attracted so few minorities. Noting that no minorities were hired for the 28 positions filled during the reporting year, NAACP/NBMC argue that either the licensee has failed to attract qualified minorities or that it is "evaluating the few minorities who do apply and deeming them unqualified so as not to have to employ them." Additionally, NAACP/NBMC contend that the licensee's comments regarding its format, location and competition from large employers "harbors intense and demeaning racial stereotypes."

38. Despite what it calls extensive efforts, the licensee states it has not been able to identify qualified minority applicants. The licensee explained that during the past twelve months, it sent quarterly referral request letters to four of its minority and female referral organizations. However, it did not contact each source for each job opening. Arguing that the significance of the failure to employ minorities on its staff is overstated given the station's small size and the availability of minorities in the local labor force, the licensee indicates that "one minority employee would shift the parity data well into the zone of reasonableness."

39. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing. The record does not reveal any evidence of discrimination. The licensee occasionally utilized minority specific sources along with its general organizations and its efforts yielded some, albeit few, minority applicants.

40. However, the record indicates that for 24 jobs the licensee neglected to conduct meaningful recruitment. Thus, in our view, the licensee's record warrants the imposition of sanctions. WFMK-FM's record of EEO efforts is more serious than WWCT(FM), *Applications of Certain Broadcast Stations Serving Communities in the State of Illinois*, FCC 92-434 (released: September 21, 1992), but less deficient than the record of *WOOJ/WOOJ-FM*, 4 FCC Rcd 6178 (1989). In WWCT(FM),[25] we imposed reporting conditions and issued a Notice of Apparent Liability for $10,000. The licensee of WWCT(FM) reported 13 full-time hiring opportunities from 1986 to 1989. The licensee affirmatively recruited for eight of those 13 jobs, contacting a variety of sources and attracting four minority applicants from a general circulation newspaper. For its remaining five vacancies, WWCT(FM) was unsure of the sources used for one vacancy and drew applicants from applications on file for four vacancies. Applicant flow data was not collected for seven of the 13 jobs. For the remaining six positions, the hiree was the only applicant. The licensee was unsure of the race of those interviewed for five vacancies. However, for eight positions for which interviewee data was kept, the licensee did not interview minorities. Moreover, we concluded that WWCT(FM) did not conduct meaningful self-assessment. Lastly, the licensee did not report any minority employees on its staff of 17 employees nor did it hire any minorities for its 13 full-time jobs. Like WWCT(FM), the licensee in this case did not report any minorities on its similarly sized full-time staff nor make any minority hires for full-time positions. However, WFMK-FM's record is more serious than WWCT(FM)'s because, unlike WWCT(FM), the licensee in the instant case filled the majority of its jobs, 24 full-time positions, with minimal or no outreach efforts. Specifically, nine vacancies received no recruitment attention, and an additional 15 jobs were announced to only one referral organization.

41. At the same time, WFMK's record is less deficient than the EEO record of WOOJ/WOOJ-FM. In WOOJ/WOOJ-FM, we imposed reporting conditions and issued a Notice of Apparent Liability in the amount of $15,000. Located in the Fort Myers MSA (10.4% minority labor force), the licensee of WOOJ/WOOJ-FM filled 35 full-time positions from 1986 to 1988. The licensee's recruitment efforts consisted of only sending annual general letters to minority and female organizations for three years. The letters, which did not mention specific job openings, resulted in one minority referral in the final month of the license term. Additionally, the licensee did not self-assess or modify its EEO program. Thus, WOOJ/WOOJ-FM failed to engage in specific recruitment for any of its positions. WFMK-FM sent similar general letters and thus failed to recruit for nine of its 47 jobs. Also, while WOOJ/WOOJ-FM's efforts resulted in only one minority referral in the final month of the license term, WFMK-FM attracted four minority applicants for full-time jobs throughout the license term. We further note that none of the three aforementioned licensees maintained adequate employment activity data or self-assessed its efforts. Based on the foregoing, we find it appropriate to grant the license renewal application of WFMK-FM subject to reporting conditions. We will also impose a Notice of Apparent Liability in the amount of $13,000 for violation of Commission rule 73.2080 (b)(3), (b)(5), (c)(2) and (c)(V.

V. CONCLUSION

42. Upon review of the record and the submissions of the parties, we find grant of the renewal applications justified in all cases. However, to ensure that better efforts are taken with their respective EEO programs, we will impose reporting conditions on the licensees of WBCK/WBXX-FM, WVIC/WVIC-FM, WAAM(AM) and WFMK-FM. Further, because of serious, repeated violations of the Commission's EEO Rule, we will issue the following Notices of Apparent Liability: $2,500 against the licensee of WAAM(AM) and $13,000 against the licensee of WFMK-FM.

VI. ORDERING CLAUSES

43. Accordingly, IT IS ORDERED that the Petition to Deny filed by the Michigan State Conference of Branches of the NAACP and its affiliate branches against Stations WJIM/WJIM-FM and WFMK-FM IS DENIED.

44. IT IS FURTHER ORDERED that the informal objections filed by the Michigan State Conference of Branches of the NAACP and its affiliate branches and the NBMC ARE DENIED.

45. IT IS FURTHER ORDERED that the Joint Request for Approval of the Settlement Agreement IS GRANTED and the settlement agreement submitted by NAACP/NBMC and Goodrich Broadcasting, Inc. is approved, with the exception of the service payment provisions.

46. IT IS FURTHER ORDERED that the license renewal applications for Stations WJIM/WJIM-FM ARE GRANTED.

47. IT IS FURTHER ORDERED that the license renewal applications for Stations WPZA/WAMX-FM ARE GRANTED.

48. IT IS FURTHER ORDERED that the license renewal applications for Stations WBCK/WBXX-FM and WVIC/WVIC-FM ARE GRANTED subject to the reporting conditions specified herein.

49. IT IS FURTHER ORDERED that the license renewal application for Station WAAM(AM) IS GRANTED subject to the reporting conditions specified herein, and pursuant to Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $2,500.

50. IT IS FURTHER ORDERED that the license renewal application for Station WFMK-FM IS GRANTED subject to the reporting conditions specified herein, and pursuant to Section 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $13,000.

51. IT IS FURTHER ORDERED that the licensees of Stations WBCK/WBXX-FM, WVIC/WVIC-FM, WAAM(AM) and WFMK-FM submit to the Commission an original and one copy of the following information on June 1, 1993, June 1, 1994, and June 1, 1995:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[26]

(b) A list of employees as of the May 1, 1993, payroll period for the first report and as of the May 1, 1994, and May 1, 1995, payroll periods for the second and third reports by job title, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex, and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

52. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

53. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

54. Should the parties have any questions regarding this action or require further information concerning employment reports, they may call the Mass Media Bureau's EEO Branch at (202) 632-7069. With respect to the forfeiture proceedings, the licensees may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this Order. Any comments concerning the ability to pay should include those financial items set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] The Petition to Deny also included challenges against other radio stations in Michigan. They will be addressed in separate Commission orders.

[2] On January 3, 1990, NAACP/NBMC filed a motion to withdraw the challenge against the renewal for stations WVIC/WVIC-FM and, together with Goodrich Broadcasting, Inc., licensee of WVIC/WVIC-FM, filed a settlement agreement. We have reviewed the settlement agreement pursuant to *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780 (1989), *recon. granted in part*, 5 FCC Rcd 3902 (1990)(*Renewal Policies Order*). We find that the settlement agreement generally complies with the Commission's rules and policies, and, therefore, the petition to deny is dismissed. However, pursuant to the *Renewal Policies Order*, we review all citizens' agreements reached in exchange for dismissing a petition to deny and "presume that any agreement with a petitioner that calls for the petitioner, or any person or organization related to the petitioner, to carry out, for a fee, any . . . employment . . . initiative does not further the public interest and hence will likely be disapproved." 4 FCC Rcd at 4786. However, such a presumption can be rebutted where there is "clear and convincing evidence" that the petitioner is the only entity available to perform a given service. In this connection, we indicated that we would take into account local and national EEO resource services that may be available, the costs of such services, and whether a licensee would likely pay for the services absent the citizens' agreement. In addition, we stated that we would consider the extent to which the citizens' agreement provision would further compliance with Commission policies such as the EEO rules and policy. 5 FCC Rcd at 3906. In the instant case, NBMC's sole argument is that it is one of only two national organizations that provide minority employment referrals. We note that the National Association of Broadcasters Employment Clearinghouse is the other such organization. Neither NBMC nor any party to the settlement agreement has provided information to distinguish NBMC's referral service from that of the NAB's or the local minority employment support and referral services listed by the licensee as recruitment sources. *See* paragraph 25, *infra*. Similarly, the parties have provided no information concerning the costs of EEO resource services that may be available to the licensee. Therefore, we find no basis for approving this aspect of the agreement and accordingly, we reject the service payment provisions. We accept the other terms of the settlement as compliant with our *Renewal Policies Order*.

[3] The Petition to Deny having been dismissed against WVIC/WVIC-FM pursuant to the settlement agreement between NAACP/NBMC and the licensee, the issue of party in interest status against WVIC/WVIC-FM is moot.

[4] The licensees were not challenged regarding their efforts directed toward women. Nonetheless, as is our practice in all cases, we reviewed each station's EEO efforts toward women. We found them sufficient.

[5] On February 1, 1988, Double L Broadcasting of Lansing, Ltd. Partnership purchased the stations from Mich-A-Media, Inc.

[6] The Lansing-East Lansing MSA includes 43.8% females and 8.5% minorities (4.9% Black, 2.5% Hispanic, .7% Asian/Pacific Islander, .4% American Indian). No minorities were reported on the licensee's Annual Employment Reports from 1986 to 1989 wherein the licensee reported between 16 and 17 overall employees and between 15 and 16 upper-level employees.

[7] As we have previously stated, if a meaningful pool of minority referrals and applicants can be attracted from use of general sources, minority referral sources are not required. *See Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704, 1709 n.8 (1990) (*South Carolina*) ; *see also Applications for Renewal of License of Certain Broadcast Stations Serving Melbourne, Florida and Other Communities in the Florida Area*, 5 FCC Rcd 6738 (1990); *In re WINFAS, et al.*, 5 FCC Rcd 4902 (1990); *Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, 5 FCC Rcd 4893 (1990).

[8] We note that the licensee classified the Traffic Manager in the Officials and Managers category. We note, however, that this is generally a lower-level position. *See* Instructions for Completion of FCC Form 395-B Broadcast Station Annual Employment Report, Section 7(e).

[9] The licensee acquired the FM station on December 8, 1986, and the AM station on July 8, 1987. We also note that the licensee changed the call letters of the FM station from WMJC to WBXX-FM on October 26, 1989.

[10] The Battle Creek Metropolitan Statistical Area (MSA) includes 42.4% females and 10.3% minorities (8% Black, 1.5% Hispanic, .4% Asian/Pacific Islander, .4% American Indian). In its 1986 Annual Employment Report, the licensee reported 16 full-time overall employees, including one (6%) Black employee. No minorities were reported on the upper-level staff of 14 employees. In 1987, the licensee had an overall staff of 14 employees, including two (14%) minorities. The upper-level staff comprised 13 employees, including one (8%) Black employee. In 1988, the licensee reported 19 employees on its overall staff, with one (5%) Black employee. The upper-level staff included 16 employees, with no minorities reported. In 1989, the licensee had an overall staff of 18 employees, including one (6%) Black employee. No minorities were reported on the upper-level staff of 15 employees.

[11] The licensee stated that it made "great efforts" to provide the requested data through reconstruction, but that it does not have sufficient documentation. It argued that it "should not be held accountable for its inability to produce employment records for a period when no notice had been given that such records were required." Commission clarification of this issue can be found in *Broadcast EEO*, *supra*, 2 FCC Rcd 3967 (1987); *see also* 4 FCC Rcd 1715 (1989)(request for clarification by the National Association of Broadcasters). A licensee can be expected to possess the requested data, especially in light of the requirement that it engage in ongoing self-assessment of its EEO program. As we stated in *Broadcast EEO*, such referral data "should have been kept by licensees at least since 1976 . . . . " *Id.* at 1716. *See Nondiscrimination in Employment Practices*, 60 FCC 2d 226, 236 (1976); *see also In re Application of Arkansas Educational Television Commission For Renewal of License of Stations KETS(TV), et al. Little Rock, Arkansas*, 5 FCC Rcd 2745 (1990); *In the Matter of License Renewal Application of Eastern Carolina Broadcasting Company, Inc., Former Licensee of Stations WGBR(AM)/WKTC(FM) Goldsboro, North Carolina*, 6 FCC Rcd 6154 (1991).

[12] As the Commission stated in *Leflore Broadcasting, Inc. v. FCC*, 66 FCC 2d 734, 784-85 (1985), a station's format has no bearing on its EEO obligations.

[13] Heretofore, the Commission has indicated that it would allow the use of alternative data when a licensee justifies this departure with reference to factors like the distance of the station from areas with significant minority population in the MSA, commuting difficulties and the lack of success of previous recruitment efforts. *See In re Application of National Capital Christian Broadcasting, Inc. for Renewal of License of Station WTKK(TV) Manassas, Virginia*, 3 FCC Rcd 1919 (1988) *(Manassas); Broadcast EEO, supra*, 2 FCC Rcd 3967 (1987). While the licensee articulated some of the relevant factors for alternative data, it did not specifically explain what efforts it took to attract qualified minority applicants from the MSA and the results of those efforts. Nor did it proffer a different location as the foundation for use of alternative data. We have stated previously that "were a licensee to document that, despite extensive recruitment involving use of minority referral sources, it was unable to obtain qualified applicants from areas of minority concentration in the MSA, reference to alternative labor force data would be appropriate." *Manassas, supra*, at 1920. *See also In re License Renewal Applications of Certain Broadcast Stations Serving the Chicago Metropolitan Area*, 89 FCC 2d 1031 (1982). Thus, we do not believe that the licensee has provided an adequate and reasoned basis for using a labor force other than the MSA.

We note that this licensee has also applied for renewal of its license for station WFMK-FM, *see* paragraph 36, *infra*. Therein, the licensee makes similar arguments regarding its record-keeping requirements, its format, the applicable labor force and competition from large employers in the metropolitan area. We reject those arguments as raised in mitigation of the licensee's EEO obligations regarding station WFMK-FM, as we have in the same context in the instant case for stations WBCK/WBXX-FM.

[14] Edward F. Baughn transferred majority control in Washtenaw Broadcasting Company, Inc. to Financial Advisory Services, Inc. on December 30, 1986. Based on this transfer of control, the licensee provided employment data for the period January 1, 1987, through June 1, 1989. We also note that the licensee changed the call letters of the AM station from WPAG to WPZA on December 6, 1987, and changed the call letters of the FM station from WPAG-FM to WAMX-FM on April 3, 1989.

[15] The Ann Arbor MSA has a labor force of 44.8% females and 12.4% minority (8.9% Black, 1.3% Hispanic, 1.9% Asian/Pacific Islander and .3% American Indian). The licensee's 1987 Annual Employment Report indicated a full-time overall staff of 14, including 13 upper-level employees. No minorities were reported on staff. In 1988, the licensee reported an overall staff of 17 employees (including one (6%) minority) and an upper-level staff of 15 persons. In 1989, the overall staff increased to 18 employees (including one (6%) minority) and an upper-level staff of 17 employees.

[16] Two of the five upper-level interview pools which included minorities were for copywriter/traffic positions which the licensee classified as upper-level. However, this is generally a lower-level position. *See note 8, supra.*

[17] Commission policy as stated in *South Carolina, supra*, holds that if significant minority referrals can be obtained from general sources, minority specific sources are not necessary.

[18] *See* note 6, *supra*, for Lansing-East Lansing MSA labor force statistics. In 1986, the licensee reported a full-time staff of 25 employees and an upper-level staff of 22 employees, including one (5%) minority upper-level employee. In 1987, the overall staff increased to 27 employees, including 23 upper-level employees. No minority employees were reported. In 1988, overall staff

decreased to 24 employees, including 22 upper-level employees. No minorities were reported on staff. In 1989, the licensee reported an overall staff of 26 employees and an upper-level staff of 24 employees, including one (4%) upper-level minority employee.

[19] *See* note 15, *supra*, for the Ann Arbor labor force statistics. In its 1986 Annual Employment Reports, the licensee reported an overall and upper-level staff of 16, including one (6%) upper-level minority employee. In 1987, the licensee reported an overall and upper-level staff of 15 employees, including one (7%) upper-level minority employee. In 1988, the overall staff decreased to 12 employees, including 11 upper-level employees. No minority employees were reported that year. In 1989, the licensee reported no minorities on an overall staff of 15 and an upper-level staff of 13 employees. However, the licensee stated that, prior to the end of the license term, it hired a Black female for an upper-level position who did not report for work.

[20] The licensee claimed that it failed to classify one of its upper-level employees on its 1989 Annual Employment Report as a minority. Additionally, it noted that because NAACP/NBMC did not have the station's 1984 Annual Employment Report, NAACP/NBMC is unaware of the upper-level minority employee reported in 1984. The licensee argued that the presence of those two employees substantiate that minorities were reported in each year of the license term except 1985 and 1988.

[21] We note that the licensee's Annual Employment Reports from 1983 to 1989 frequently included the same number of employees on both overall and upper-level staffs. We admonish the licensee to review its job classifications to ensure proper categorization. *Carolina Christian Broadcasting, Inc.*, 3 FCC Rcd 1907 (1988).

[22] On November 28, 1986, the Commission granted an assignment of license for WFMK-FM from WFMK, Inc. to Liggett Broadcast, Inc.

[23] *See* note 6, supr a, for the Lansing-East Lansing MSA labor force statistics. No minorities were reported on the licensee's 1986 - 1989 Annual Employment Reports which included full-time staffs ranging from 14 to 18 overall employees and between 13 and 14 upper-level employees.

[24] In its renewal application the licensee stated, "Despite the fact that the station has not found qualified job applicants among minorities other than women, we feel that our efforts have been adequate to make opportunities available to such applicants." We advise the licensee that our EEO Rule imposes affirmative responsibilities toward *both* females and minorities. *See In the Matter of Amendment of Part VI of the FCC Forms 301 et al. and Adding the Equal Employment Program Filing Requirement to Commission Rules*, 32 FCC 2d 708 (1971); *In the Matter of Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC 2d 226 (1976).

Further, the licensee proferred several arguments, *e.g.*, record-keeping burdens, its radio format, its inaccessibility by public transportation and competition from large employers as "limiting factors" which it claims affected its EEO program. For the reasons stated in notes 11 and 13, *supra*, we expressly reject these arguments.

[25] WWCT(FM) is located in the Peoria MSA which includes a 6.5% minority labor force (4.9% Black). The station's full-time staff ranged from 13 to 17 employees.

[26] Such a list might start:

1) News Director: Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T.
	1 Hispanic male	National Hispanic
	1 Black female	Media Coalition
		NAACP

Sources contacted - Local Newspaper, A.W.R.T., National Hispanic Media Coalition, and NAACP.

Selected - Hispanic male (08/19/91).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 90-5
37842

In the Matter of	)	
	)	
Petition of the Ameritech Companies	)	RM-6113
for Amendment of Part 69 of the Rules	)	
to Enable Exchange Access "Dial 0"	)	
Services to be Provided by Local	)	
Exchange Carriers	)	

ORDER

Adopted: January 9, 1990 **Released:** January 11, 1990

By the Commission:

I. Introduction

1. On August 7, 1987, Ameritech filed a petition for rulemaking seeking changes to Part 69 of our rules to accommodate two proposed dial "0" services. We now dismiss this petition on the grounds that: (1) significant changes in the industry have rendered stale the record compiled herein; and (2) the issues presented by Ameritech have been raised in more current proceedings.

II. Background

2. Ameritech's petition proposed two dial "0" services: (1) a carrier identification service under which Ameritech would route interLATA "0" calls dialed without access codes to the interexchange carrier (IXC) presubscribed to the line that would be billed for the call; and (2) a call processing service under which Ameritech would perform call processing functions (i.e., validating calling cards and obtaining acceptance of collect calls or third number calls) on behalf of IXCs. Subsequent to the filing of Ameritech's petition, Bell Atlantic filed a petition proposing a "billed party preference" service much like Ameritech's carrier identification service.

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1 See Bell Atlantic Telephone Companies Petition for Rulemaking to Establish Uniform Dialing Plan From Pay Telephones, RM-6723, filed April 14, 1989.

Comments filed in response to the Bell Atlantic petition address many of the issues raised by the Ameritech petition.

III. Discussion

3. There have been fundamental changes in the telecommunications industry since compilation of the present record. Most notably, the United States District Court for the District of Columbia has required the Bell Operating Companies (BOCs) and the GTE Operating Companies to implement equal access on their payphones through presubscription of premises owners, while expressing a preference, in the long-term, for a carrier identification-type equal access methodology.[2] In addition, the increased presence of privately owned payphones (that is, payphones not owned by a local exchange carrier) and alternate operator service providers has altered the structure of the payphone and operator service industries and raise important policy considerations. These changes and others have rendered the record on the Ameritech petition stale. Therefore, recognizing that issues raised in the Ameritech petition may be addressed in the context of other proceedings with more current records, we dismiss Ameritech's petition and terminate this proceeding.

IV. Ordering Clause

4. Accordingly, IT IS ORDERED, that Ameritech's Petition for Rulemaking on Dial "0" Exchange Access Traffic, RM-6113, is DISMISSED WITHOUT PREJUDICE, pursuant to Sections 4(i) and 4 (j) of the Communications Act of 1934, 47 U.S.C. §§ 154 (i) and (j), and Section 1.401(e) of the Commission's Rules, 47 C.F.R. §1.401(e).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Donna Searcy
Secretary

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2 United States v. Western Electric Co., 698 F. Supp. 348 (D. D.C. 1988); United States v. GTE Corp., Mem., Civil Action No. 83-1298 (D. D.C. Dec. 23., 1988).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FCC 90-6
37839

In the Matter of	)	
	)	
Petition for Rulemaking to Consider Authorizing Competitive Access by Carriers and Users to the INTELSAT Space Segment for the Provision of Customized International Communications Services	)	RM-4904

MEMORANDUM OPINION AND ORDER

Adopted: January 9, 1990 Released: January 11, 1990

By the Commission:

1. On February 21, 1985, the National Telecommunications and Information Administration (NTIA) filed a petition for rulemaking requesting the Commission to consider authorizing competitive access by carriers and users to the INTELSAT space segment for the provision of customized international communications services. The petition was placed on public notice on March 21, 1985. Comments were filed by interested parties on April 22, 1985 and reply comments were filed on May 7, 1985.

2. Upon review of the record in this proceeding, we conclude that dismissal of the petition without prejudice is warranted. Since NTIA filed its petition, there have been a number of important developments which may impact Commission consideration of the proposal: (1) court affirmation of the Commission's direct access decision in CC Docket No. 82-548;[1] (2) Commission authorization of separate satellite systems;[2] (3) introduction of fiber optic cable technology;[3] (4) Commission authorization of private fiber optic cable

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1 Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers, 97 FCC 2d 296 (1984), aff'd sub nom. Western Union International, Inc. v. FCC, 804 F.2d 1280 (D.C. Cir. 1986).

2 Establishment of Satellite Systems Providing International Communications, 101 FCC 2d 1046 (1985), recon., FCC 86-144 (released April 17, 1986), further recon., FCC 86-471 (released November 5, 1986).

3 See American Telephone and Telegraph Co., 98 FCC 2d 440 (1985) (TAT-8

systems;[4] (5) elimination of the Commission's circuit distribution policy in CC Docket No. 87-67;[5] (6) introduction by Comsat of tariffs offering long-term rates and more flexible use of INTELSAT satellite capacity[6]; and (7) the Commission's decision in CC Docket No. 87-75 on competitive access to INMARSAT aeronautical services.[7] The current record is stale and does not reflect these or other recent developments which interested parties may consider relevant to the proposal in the petition.

3. Accordingly, the petition for rulemaking filed by NTIA IS DISMISSED WITHOUT PREJUDICE pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), and Section 1.407 of the Commission's Rules and Regulations, 47 C.F.R. §1.407.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Donna R. Searcy
Secretary

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decision); American Telephone and Telegraph Co., Mimeo No. 1794 (Com. Car. Bur. January 7, 1986) (HAW-4/TPC-3 decision); American Telephone and Telegraph Co., 4 FCC Rcd 1129 (1988), erratum, 4 FCC Rcd 1136 (1989) (TAT-9 decision).

4 See Tel-Optik Limited, 100 FCC 2d 1033 (1985) (Private Cable decision), Mimeo No. 4618 (Com. Car. Bur. May 17, 1985) (Final Cable Landing Licenses); Pacific Telecom Cable, Inc., 2 FCC Rcd 2686 (1987) (Conditional License), 4 FCC Rcd 8061 (1989) (Final Cable Landing License).

5 Policy for the Distribution of United States International Carrier Circuits Among Available Facilities During the Post-1988 Period, 3 FCC Rcd 2156 (1988).

6 See, e.g., Comsat Tariff F.C.C. No. 103, Section 6.1, 7th Revised Page 50 - Section 6.1.3, 2nd Revised Page 54.2.

7 Provision of Aeronautical Services via the INMARSAT System, 4 FCC Rcd 6072 (1989).

*U.S. Government Printing Office: 1992 — 342-145/80002